

# ASBOs and the Community: Towards a New Model of Liability?

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## **ABSTRACT**

This thesis argues that anti-social behaviour orders (ASBOs) are the imperfect expression of a new type of community-based liability which seeks to regulate an individual's behaviour in the context of his relationship with a particular community.

The combination of civil and criminal elements in ASBOs stems from a political will to address responsibility for behaviour which is harmful to a community. Despite the central conceptual role played by the community relationship in ASBOs, legal provisions have failed to define the nature of that relationship, relying on judicial discretion to shape the orders' application in practice. Judicial interpretation of ASBO legislation confirms the alternative nature of the orders, and the importance of the concept of community in creating a different type of liability.

From a theoretical perspective, communitarian principles provide a basis for explaining how the individual/community relationship can justify and shape liability. The figure of a responsible individual constituted by his social interactions forms the premise of this type of liability, and the concept of community in this context is established as a fluid rather than rigid notion, defined as a social group connected by a range of specific interests. A model of community-based liability can be constructed from these principles: interference with a community's interests can justify the imposition of liability, provided the individual's behaviour represents a wilful engagement with that particular community.

This model of liability provides a useful framework through which to re-examine ASBOs. While the case law broadly adopts the defining elements mentioned above, the use of ASBOs shows examples of misapplications of the principles of a community-based model of liability. Nevertheless, this framework also shows how ASBOs can be seen as a flexible and potentially integrative approach to regulating different types of individual/community relationships, despite the missed opportunities sometimes created by their practical application.

## **INDEX OF CASES**

<i>A-G for Jersey v. Holley</i> .....	[2005] 3 WLR 29
<i>Benham v United Kingdom</i> .....	(1996) 22 EHRR 293
<i>Birmingham CC v Shafi</i> .....	[2008] EWCA Civ 1186
<i>Boness v R</i> .....	[2005] EWCA Crim 2395
<i>C v Sunderland Yth Crt, Northumbria Police and CPS</i> ....	[2003] EWHC 2385 (Admin)
<i>Chief Const of Lancashire v LM Potter</i> .....	[2003] EWHC 2272 (Admin)
<i>Chief Const of West Midlands v Birmingham Justices</i> ...	[2002] EWHC 1087 (Admin)
<i>City of London Corp v Bovis Construction Ltd</i> .....	[1992] 3 All E.R. 697
<i>Clingham v Kensington and Chelsea RLBC</i> .....	[2001] EWHC Admin 1
<i>Colohan</i> .....	[2001] 2 F.L.R. 757
<i>Coventry CC v Finney</i> .....	[1995] QBD 432
<i>DPP v Ramsdale</i> .....	The Independent, March 19, 2001
<i>DPP v Morgan</i> .....	[1976] AC 182
<i>Engel v The Netherlands (No 1)</i> .....	(1976) 1 EHRR 647
<i>Gouriet v UPOW</i> .....	[1978] AC 435
<i>Fairweather v Comm of Police for Metropolitan</i> .....	[2008] EWHC 3073 (Admin)
<i>Heron v Plymouth CC</i> .....	[2009] EWHC 3562 (Admin)
<i>Hills v Chief Constable of Essex</i> .....	[2006] EWHC 2633 (Admin)
<i>Jennison v Baker</i> .....	[1972] 2 QB 52
<i>Jones v Whalley</i> .....	[2007] 1 AC 63
<i>Lau v DPP</i> [2000].....	1 F.L.R. 799
<i>Lonergan v Lewes Crown Crt &amp; Ors</i> .....	[2005] EWHC 457 (Admin)
<i>Maria Annie Davies</i> .....	21 QBD 236
<i>McClarty and McClarty v Wigan MBC</i> .....	(unreported) 30/10/2003
<i>N v DPP</i> .....	[2007] EWHC 883 (Admin)
<i>Phonographic Perf Ltd v. Amusement Caterers (Peckham) Ltd</i> .....	[1964] Ch. 195
<i>R (application of Cooke)</i> .....	[2008] EWHC 2703 (Admin)
<i>R (Gujra) v DPP</i> .....	[2012] EWHC 472

*R (McCann) v Crown Court at Manchester*..... [2001] 1 WLR 1084  
*R (McCann) v Crown Court at Manchester*..... [2001] 1 WLR 358  
*R (Mills) v Birmingham Mag Crt*..... [2005] EWHC 2732 (Admin)  
*R (T) v St Albans CC*..... [2002] EWHC 1129 (Admin)  
*R (Stanley, Marshall and Kelly) v MPC*..... [2004] EWHC 229 (Admin)  
*R v Hancock and Shankland*..... [1986] A.C. 455  
*R v Adomako*..... [1994] 2 All ER 79 HL  
*R v Ahluwalia*..... [1992] 4 All ER 889  
*R v Austin & Ors*..... [2009] EWCA Crim 394  
*R v Barclay*..... [2011] EWCA Crim 32  
*R v Brzezinski*..... [2012] EWCA Crim 198  
*R v Charan Verdi*..... [2004] EWCA Crim 1485  
*R v Charles*..... [2009] EWCA Crim 1570  
*R v Dolan, R v Whittaker*..... [2007] EWCA Crim 2791  
*R v Frost* ..... [2006] EWCA Crim 2705  
*R v Ghosh*..... [1982] Q.B. 1053  
*R v Gilbertson* ..... [2009] EWCA Crim 1715  
*R v Gowan*..... [2007] EWCA Crim 1360  
*R v Hyam*..... [1975] A.C. 55  
*R v Jones* ..... [2006] EWCA Crim 2942  
*R v Mann*..... (21 Feb 2000, unreported)  
*R v McGrath*..... [2005] EWCA Crim 430  
*R v Belaid*..... [2008] EWCA Crim 2153  
*R v Moloney*..... (1985) 1 All E R 1025  
*R v Moore*..... [2011] EWCA Crim 1100  
*R v Avery and Others*..... [2009] EWCA Crim 2670  
*R v Nedrick*..... [1986] 1 W.L.R. 1025  
*R v Nicholson*..... [2006] EWCA Crim 1518  
*R v P*..... [2004] EWCA Crim 287  
*R v Page*..... [2004] EWCA Crim 3358  
*R v Rush*..... [2005] EWCA Crim 1316  
*R v Stevens*..... [2007] EWCA Crim 1128

*R v Werner*..... [2004] EWCA Crim 2931  
*R v Thornton*..... [1992] 1 All ER 306  
*R v Vittles*..... [2004] EWCA Crim 1089  
*R v W*..... [2009] EWCA Crim 2097  
*R v Woollin*..... [1999] 1 A.C. 82  
*Scott v Scott*..... [1913] AC 417  
*Steel v UK*..... (1998) 28 EHRR 603  
*Steiner Products Ltd v Willy Steiner Ltd*..... [1966] 2 All ER 387  
*Stevens v South East Surrey Magistrates Court*..... [2004] EWHC 1456 (Admin)  
*Stoke on Trent City Council v B&Q Retail Ltd*..... [1984] 1 A.C. 754  
*The Coca Cola Co. v Aytachi*..... [2003] EWHC 91  
*Woolmington v DPP*..... [1935] UKHL 1

## **ABBREVIATIONS**

ASBA 2003.....	Anti-Social Behaviour Act 2003
ASBCPA 2014 .....	Anti-Social Behaviour, Crime and Policing Act 2014
ASBO .....	Anti-Social Behaviour Order
CBO .....	Criminal Behaviour Order
CDA 1998 .....	Crime and Disorder Act 1998
CPI .....	Crime Prevention Injunction
CrASBO.....	Criminal Anti-Social Behaviour Order (post-conviction ASBO)
CSO .....	Community Safety Order
ECHR .....	European Convention of Human Rights
PHA 1997 .....	Protection from Harassment Act 1997
PNI .....	Public Nuisance Injunction
PRA 2002 .....	Police Reform Act 2002
TSP .....	Two-Step Prohibition

## **TABLE OF CONTENTS**

<b>ABSTRACT</b>	<b>3</b>
<b>INDEX OF CASES</b>	<b>4</b>
<b>ABBREVIATIONS</b>	<b>7</b>
<b>TABLE OF CONTENTS</b>	<b>8</b>
<b>INTRODUCTION</b>	<b>15</b>
<b>I. GENERAL APPROACH AND METHODOLOGY</b>	<b>17</b>
<b>II. STRUCTURE OF THE THESIS</b>	<b>19</b>
<b>A. Part 1: Unveiling the role of the concept of community in ASBOs</b>	<b>20</b>
<b>B. Part 2: Developing a Model of Community-Based Liability as a Frame of Reference to Assess ASBOs</b>	<b>22</b>
<b>CHAPTER 1 – ASBOS AND THE CIVIL/CRIMINAL DISTINCTION: UNCOVERING THE COMMUNITY THREAD</b>	<b>25</b>
<b>I. THE DUAL NATURE OF ASBOS – CHALLENGING EXISTING MODELS OF LIABILITY</b>	<b>26</b>
<b>A. The Law</b>	<b>26</b>
1. An introduction to ASBOs	27
2. The dual nature of ASBOs	28
a) Civil injunction	28
b) Criminal offence	30
<b>B. Upholding the Dual Nature of ASBOs as a ‘Legislative Technique’ – the House of Lords’ Decision in <i>McCann</i></b>	<b>31</b>
1. The facts	32
2. The decision	34
	<b>8</b>



a)	ASBOs' civil and criminal nature	34
b)	The dual nature of ASBOs' and the 'social problem' of anti-social behaviour	37
<b>II.</b>	<b>DUAL LEGAL INSTRUMENTS AND THE CRIMINAL/CIVIL DISTINCTION</b>	<b>39</b>
<b>A.</b>	<b>The Civil/Criminal Distinction: Two Interpretations</b>	<b>40</b>
1.	Functional distinction	40
2.	Procedural distinction	41
<b>B.</b>	<b>Hybrid Measures and the Civil/Criminal Classification</b>	<b>43</b>
1.	Two examples of hybrid legal instruments: civil contempt and public nuisance injunctions	44
a)	Civil contempt	44
b)	Public nuisance injunctions	46
2.	Re-assessing the civil/criminal distinction: from rigid dichotomy to a flexible continuum	47
a)	ASBOs, civil contempt, public nuisance injunctions and the civil/criminal classification: similarities and differences	48
b)	Beyond the dichotomy	51
<b>III.</b>	<b>MAKING SENSE OF ASBOS' DUAL NATURE: ACADEMIC PERSPECTIVES</b>	<b>52</b>
<b>A.</b>	<b>ASBOs and the Civil/Criminal Distinction</b>	<b>52</b>
1.	ASBOs as civil by nature: the contempt analysis	52
2.	ASBOs as essentially criminal: 'backdoor criminalisation' and streamlined enforcement.	55
a)	Backdoor criminalisation through procedure	55
b)	ASBOs as an enforcement mechanism	57
<b>B.</b>	<b>Another Vision of ASBOs: the Community Angle</b>	<b>60</b>
1.	ASBOs and the social problem of anti-social behaviour	61
a)	The McCann decision	61
b)	ASBOs and the protection of 'vulnerable autonomy'	64
2.	Redefining the civil / criminal continuum: relationships and liability	66
3.	ASBOs and the community relationship	69
<b>IV.</b>	<b>CONCLUSION - HYPOTHESIS</b>	<b>73</b>

## **CHAPTER 2 – FROM CSOS TO ASBOS: UNDERSTANDING THE DUAL NATURE OF ASBOS AND THE CONCEPT OF COMMUNITY IN THEIR POLITICAL CONTEXT**

**76**

### **I. INTRODUCING DUAL ORDERS: FROM CSOS TO ASBOS**

**76**

#### **A. Dual Civil/Criminal Orders before ASBOs**

**77**

1. Community safety orders: the precursors to ASBOs 77
  - a) 'A Quiet Life': introducing the community safety order 77
  - b) 'Protecting Our Communities': broadening the orders 80
2. Stalking and Anti-social behaviour: context-dependent behaviour and the community relationship 81
  - a) Putting dual orders on the legislative agenda: the Housing and Stalking Bills 81
  - b) Refining the community thread in ASBOs: stalking, anti-social behaviour and context-dependent crime 83

#### **B. Introducing ASBOs: the 'Gap' Narrative and the Dual Nature of the Orders**

**86**

1. Consultation and the Crime and Disorder Bill 87
  - a) The Consultation Paper 87
  - b) Crime and Disorder Bill 1998: the last step to ASBOs 88
2. ASBOs' dual nature and the 'gap' narrative 90
  - a) Creating the suggestion of a gap 90
  - b) Beyond the 'gap' narrative 92

### **II. THE CONCEPT OF COMMUNITY IN ASBO LEGISLATION**

**94**

#### **A. The Procedural and Substantive Nature of ASBOs: Outlining the Concept of Community**

**95**

1. The concept of community in the initial civil order 96
  - a) Relevant authorities: local characteristic of the orders 96
  - b) Shifting the evidentiary burden: hearsay and professional witnesses 98
2. The criminal offence: adding teeth to the ASBO 100
  - a) Creation of a distinct criminal offence 100
  - b) CrASBOs: confirming the alternative nature of liability 103

#### **B. Anti-Social Behaviour and the Community in ASBOs**

**106**

1. Anti-social behaviour in the Crime and Disorder Act 1998 107
  - a) A purposive lack of definition 107
  - b) Refining the concept of anti-social behaviour: opening up the community thread 108
2. Flexibility or uncertainty? 110

**CHAPTER 3 – JUDICIAL INTERPRETATION OF ASBO LEGISLATION: THE  
INDIVIDUAL/COMMUNITY RELATIONSHIP IN PRACTICE 113**

**I. UNCOVERING THE TRUE PURPOSE OF ASBOS: ASBOS' DUAL NATURE  
FROM THE JUDICIAL PERSPECTIVE 114**

**A. ASBOs and the Civil/Criminal Distinction in Case Law 115**

**B. ASBOs and the Criminal Law 117**

1. Not Punishment 117
2. ASBOs, bail and licence provisions: revealing the orders' protective purpose 119
  - a) Bail conditions 120
  - b) Licence provisions 121

**II. THE CONCEPT OF COMMUNITY IN THE JUDICIAL INTERPRETATION  
OF ASBO LEGISLATION: FOUR CHARACTERISTICS 123**

**A. Redefinition of the Individual and His Responsibility 123**

1. Lack of *mens rea* requirement in ASBOs 124
2. Finding a subjective element in ASBOs 125

**B. Finding the Harm of Anti-Social Behaviour: Redefining the Public Sphere 127**

1. Defining the community context: 'relevant persons' and 'not of the same household' 128
2. ASBOs and the harm of anti-social behaviour: impact on a community 131

**C. Judicial Discretion, Dynamism and Flexibility 134**

1. Pragmatism and the orders' procedural requirements 135
2. Flexibility and Specificity in the orders' application: taking into account the community context 137

**D. Individuals and Communities: Defining the Communicative Nature of ASBOs 140**

1. Specific terms and 'personalised' communication 141
2. Communicating with the community 143

**CHAPTER 4 – REDEFINING THE INDIVIDUAL/COMMUNITY RELATIONSHIP:  
TOWARDS A COMMUNITY-BASED MODEL OF LIABILITY 146**

**I. LIBERAL INDIVIDUALISM AND CRIMINAL LIABILITY: TOWARDS AN  
ASOCIAL FIGURE OF THE RESPONSIBLE INDIVIDUAL 147**

<b>A.</b>	<b>Liberal Principles and the Figure of the Autonomous Individual</b>	<b>148</b>
1.	Liberal conceptions of justice and the figure of the individual	148
2.	From Rawls' veil of ignorance to the liberal 'fear of the social'	149
<b>B.</b>	<b>Liberal Individualism and Criminal Liability: Defining the Figure of the Responsible Individual</b>	<b>152</b>
1.	Criminal liability and the asocial individual: limiting the scope and depth of the criminal law	152
a)	Limiting the scope of criminal liability – the harm principle	153
b)	Defining the responsible individual: from character to capacity and orthodox subjectivism	155
2.	Pure subjectivism and beyond: preserving the liberal figure of the individual in criminal liability	158
a)	The dilution of subjectivism in the criminal law	158
b)	'Reasonableness' and objective standards of liability: preserving the figure of the responsible individual	161
<b>II.</b>	<b>COMMUNITY AND THE SOCIALLY CONSTITUTED INDIVIDUAL: A DIFFERENT PERSPECTIVE ON INDIVIDUAL RESPONSIBILITY</b>	<b>162</b>
<b>A.</b>	<b>Communitarianism and Social Relations: Redefining the Figure of the Individual</b>	<b>163</b>
1.	The communitarian challenge to liberalism: towards a different vision of the individual	163
a)	Communitarianism and liberalism: the normative challenge	163
b)	Communitarianism and liberalism: the methodological challenge and the need for a constitutive vision of social relations	165
2.	Communitarianism and responsibility: defining the 'socially responsible individual'	167
a)	Communitarianism and liberalism: beyond the opposition	167
b)	The figure of the socially responsible individual	170
<b>B.</b>	<b>Finding a Basis for Liability: Redefining the Community</b>	<b>173</b>
1.	Community and the law: traditional conceptions of community	173
a)	Community as Gesellschaft	173
b)	Gemeinschaft and liability	175
2.	Interactions as indicia of community	177
a)	Community and the law in postmodern society: towards a more representative vision	177
b)	Interactions in community relationships	179
3.	Redefining community relationships	181
a)	Community interactions beyond love and affection	181
		<b>12</b>

b)	Community as a web of understanding	183
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### **III. CONSTRUCTING A COMMUNITY-BASED MODEL OF LIABILITY: WILFUL ENGAGEMENT AND COMMUNITY INTERESTS 187**

<b>A.</b>	<b>Determining the Responsibility of the Socially Constituted Individual</b>	<b>188</b>
1.	Creating a relationship between individual and community	188
2.	Establishing individual responsibility: the notion of wilful engagement	189
<b>B.</b>	<b>Defining the Harm of Community-Based Liability</b>	<b>192</b>
1.	Harm as interference with a community's protected interests	192
2.	Limiting the reach of community-based liability	195

## **CHAPTER 5 – ASBOS AND COMMUNITY-BASED LIABILITY: A DIFFERENT PERSPECTIVE 199**

### **I. COMMUNITY-BASED LIABILITY IN PRACTICE: THE EXAMPLE OF ASBOS 199**

<b>A.</b>	<b>Individual Responsibility and Wilful Engagement in relation to ASBOs</b>	<b>200</b>
1.	Individual autonomy and responsibility in ASBOs: identifying wilful engagement	200
a)	Wilful engagement and the 'reasonable excuse'	201
b)	Distinguishing between wilful engagement and criminal intent	202
2.	Beyond wilful engagement: pushing the boundaries of individual responsibility	205
a)	Low-level criminal behaviour as anti-social behaviour	205
b)	Mental capacity and the ability to wilfully engage with others	206
<b>B.</b>	<b>Community Relationships and Protected Interests: Finding Harm in ASBOs</b>	<b>209</b>
1.	More than local: expanding the concept of community relationships	210
a)	ASBOs and the harm to local communities	210
b)	Specifying the harm to community relationships: instrumental and affective interests	213
2.	Stretching the reach of community interests towards imposing subjective moral judgments	218
a)	Graffiti as anti-social behaviour: protected interests or subjective judgment?	219
b)	From protected interests to moral judgments: ASBOs and prostitution	222

### **II. ASBOS AND COMMUNITY-BASED LIABILITY: REFRAMING THE ORDERS' DUAL NATURE 226**

<b>A.</b>	<b>Flexibility in ASBOs: Matching the Community Relationship</b>	<b>227</b>
1.	Flexibility in ASBOs' dual nature	227
2.	Liability, community and the value of flexibility	229
<b>B.</b>	<b>Changing the Voice of the Law</b>	<b>231</b>
1.	The communicative nature of ASBOs	232
a)	Communicating with the responsible individual	232
b)	Communicating with the community	233
2.	ASBOs and community-based liability: changing the communicative function of liability	234
	<b>CONCLUSION</b>	<b>238</b>
	<b>I. THE ANTI-SOCIAL BEHAVIOUR CRIME AND POLICING ACT 2014: OVERHAULING ANTI-SOCIAL LEGISLATION.</b>	<b>239</b>
	<b>II. CPIS AND CBOS: MOVING AWAY FROM COMMUNITY-BASED LIABILITY.</b>	<b>242</b>
	<b>BIBLIOGRAPHY</b>	<b>245</b>

## **INTRODUCTION**

In its fifteen years of existence, the anti-social behaviour order (ASBO) has rarely left the public eye. From its controversial introduction as the flagship of New Labour's crime and order policy revival, to ubiquitous media stories of 'neighbours from hell'<sup>1</sup> and troublesome youths,<sup>2</sup> the orders have become symbolic of a highly publicised concern with social disorder.<sup>3</sup> More recently, they have again been brought to the centre of public attention by the conservative government's plans to abolish and replace them entirely.<sup>4</sup> The Anti-Social Behaviour, Crime and Policing Act 2014 was designed to reform the toolkit available to the courts to deal with anti-social behaviour, and rationalise the existing remedies into a smaller package of measures.<sup>5</sup> When the relevant provisions of the 2014 Act come into force, ASBOs will be replaced by the Crime Prevention Injunction (CPI) and the Criminal Behaviour Order (CBO).<sup>6</sup> Although the reform is wider than the specific reform of ASBOs, they arguably became its most prominent casualty.<sup>7</sup>

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<sup>1</sup> See for instance 'The Nightmare Neighbours Next Door' *Channel 5* (aired in April 2014) <<http://www.channel5.com/shows/the-nightmare-neighbour-next-door>> accessed 16th May 2014; a popular tabloid newspaper also has an ongoing news category on its website entitled 'Neighbours from Hell' *Mirror* <<http://www.mirror.co.uk/all-about/neighbours%20from%20hell>> accessed 16 May 2014.

<sup>2</sup> 'Asbos 'demonising' young people' (*BBC News*, 23 April 2006) <<http://news.bbc.co.uk/1/hi/uk/4935606.stm>> accessed 16 May 2014; a website also keeps a list of ASBOs granted for certain types of behaviour, including against young persons: 'ASBOwatch: monitoring the use of Anti-Social Behaviour Orders' (*Statewatch*) <<http://www.statewatch.org/asbo/ASBOwatch.html>> accessed 16 May 2014.

<sup>3</sup> As an indication, the Guardian news website lists 285 stories related to ASBOs from 14 February 2001 to 15 February 2014, averaging around one story every two weeks <<http://www.theguardian.com/society/asbos>> accessed 16 May 2014.

<sup>4</sup> On 13<sup>th</sup> March 2014, the Anti-Social Behaviour, Crime and Policing Act 2014 (ASBCPA 2014) was given royal assent, introducing a range of new measures to replace the soon to be defunct ASBO order. The relevant provision's commencement date has not been finalised yet; 'Anti-social injunction plan 'threat to free speech' (*BBC News*, 28 November 2013) <<http://www.bbc.com/news/uk-25132129>> accessed 16 May 2014; Philip Johnston, 'What does Ipna stand for? Not law and order' *The Telegraph* (London, 25 November 2013), <<http://www.telegraph.co.uk/news/uknews/law-and-order/10472978/What-does-Ipna-stand-for-Not-law-and-order.html>> accessed 25 November 2014; Alan Travis, 'Nuisance and annoyance' injunctions abandoned after Lords defeat' *The Guardian* (London, 23 January 2014) <<http://www.theguardian.com/law/2014/jan/23/nuisance-and-annoyance-injunctions-abandoned-lords-defeat>> accessed 25 November 2014.

<sup>5</sup> Home Office, Putting Victims First – More Effective Responses To Anti-Social Behaviour (Cm 8367, May 2012) (Putting Victims First).

<sup>6</sup> ASBCPA 2014, ss 1 and 22.

<sup>7</sup> Other measures were introduced to tackle anti-social behaviour, including Community Protection Notices, introduced by s 43 of the ASBCPA, and which are meant to deal with small scale behaviour within a locality, and the Community Remedy, introduced by s 101, which can compel authorities to

The defining feature of ASBOs is their combination of civil and criminal elements, creating a hybrid process to tackle a particular type of behaviour. A civil order is granted on application<sup>8</sup> or conviction<sup>9</sup> to prevent an individual from behaving in a particular way, and breach of the terms of that order amounts to a discrete criminal offence, attracting a sentence of up to 5 years.<sup>10</sup>

In its reform of measures to tackle anti-social behaviour, the Anti-Social Behaviour, Crime and Policing Act 2014 purposefully rejects the legacy of preceding anti-social behaviour legislation, vowing 'to give frontline professionals a handful of faster, more effective powers to replace the bloated and confusing toolkit they have now.'<sup>11</sup> The reform was designed to favour a local approach to anti-social behaviour over 'the mistake of the past ... that the Government could meet these demands with a 'one size fits all' model.'<sup>12</sup>

This reform and the grim view it has taken of ASBOs makes it all the more relevant to better understand the underlying principles at play in ASBOs. In their unique combination of civil and criminal elements, the orders challenged traditional conceptions of liability and individual responsibility. New Labour originally presented them as a novel and necessary approach to tackle a new type of harmful behaviour, and their introduction was met with disapproval because of their failure to conform to existing models of liability.<sup>13</sup> However, this thesis will argue that ASBOs in fact represent an alternative model of liability, distinct from both civil and criminal models. And while some practical difficulties have arisen in the application of ASBOs, their substantive value lies in the way that their dual nature has created a legal tool which seeks to regulate the relationship between an individual and a particular community in an innovative way.

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action if enough victims of social behaviour make qualifying complaints; the act also covers various other subjects, including Dangerous Dogs (pt 7), Extradition (pt 12) and Criminal Justice and Court Fees (pt 13).

<sup>8</sup> Crime and Disorder Act 1998 (CDA 1998), s 1; see ch 1, text to n 2 for more details.

<sup>9</sup> Since 2002, an order can also be imposed on conviction for behaviour related to the criminal offence according to CDA 1998, s 1C, as added by Police Reform Act 2002 (PRA 2002), ss 61-65; see ch 2, text to n 126 for more details.

<sup>10</sup> CDA 1998, s1(10).

<sup>11</sup> Putting Victims First (n 6), 7.

<sup>12</sup> *ibid.*

<sup>13</sup> Andrew von Hirsch and others, 'Overtaking on the Right' [1995] *New Law Journal* 1501; Andrew Ashworth and others, 'Neighbouring on the Oppressive' (1996) 16(1) *Criminal Justice* 7; Andrew Ashworth and others, 'Clause 1: The Hybrid Law from Hell?' (1998) 31 *Criminal Justice Matters* 25; see ch 1, text to n 106 for a more general discussion of the negative academic reaction to ASBOs.



This thesis examines the nature and purpose of ASBOs from a doctrinal, political and judicial perspective, to create a legally and practically relevant picture of their approach to individual responsibility and liability. This analysis will then be used as a starting point to construct an alternative model of liability, and provide a new framework through which to better understand the orders' application. Ultimately, this analysis will highlight how the new measures replacing the ASBO have in fact done away with the innovative legal mechanism that the orders' dual nature introduced, along with its potential for a more contextualised approach to individual responsibility.

## **I. General Approach and Methodology**

From an academic perspective, ASBOs have been principally analysed by being compared to the two existing models of liability, i.e. whether they are civil or criminal, based on the assumption that they should be one or the other.<sup>14</sup> The starting point of this thesis is to explore how the dual nature of ASBOs challenges the traditional conceptions of individual responsibility which underlie these two models of liability.

By focusing on the particular relationship that ASBOs are seeking to regulate, and the kind of liability to which this relationship gives rise, the mixture of criminal and civil elements emerges as a distinctive feature of the orders, rather than a legislative drafting accident. This thesis will argue that the key distinction between traditional models of liability and ASBOs lies in the relationship each model seeks to regulate: in their paradigmatic application, civil liability focuses on the relationship between specific individual parties, while criminal liability seeks to regulate the relationship between an individual and society at large.<sup>15</sup> ASBOs, on the other hand, are focused on a different type of relationship: that between an individual and a group of people potentially affected by his behaviour. This group of people is typically larger and more diffuse than the individual parties wronged in civil liability, but also more restrained in scope than the notion of 'society' prevalent in criminal law, and can be best characterised as a community.

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<sup>14</sup> With the notable exception of Peter Ramsay, who developed a historical and political analysis of the orders as a protection of the right to security, Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012) see ch 1, text to n 142 and further.

<sup>15</sup> This is discussed in more details in ch 1 (n 153).

Although it has not been clearly defined throughout the drafting, legislation and judicial process, the concept of community has played a central role in the introduction, justification and application of ASBOs. This role will be presented in the first three chapters from a political, legislative and judicial perspective, before looking at the concept of community itself from a more theoretical and conceptual perspective in chapter four.

This thesis will argue that in the context of ASBOs the concept of community can be defined as small groups of individuals, making up a multitude of different communities, rather than a larger unified entity often represented as a nation or society.<sup>16</sup> While criminal liability is generally informed by the latter as a socialising factor, ASBOs represent a distinct model of liability which seeks to regulate individual's relationships with those smaller communities and protect them from harmful behaviour. It is the exploration and exposition of this model of community-based liability which forms the focus of this thesis.

Rather than starting from a purely doctrinal and normative perspective, the creation of a different model of liability and the role of the concept of community will be first examined in the specific practical context of ASBOs, before looking at the wider normative ramifications. The orders' political background and the related case law will therefore provide a starting point for the exposition of an alternative model of liability, based on an individual's relationship with a particular community. The first half of this work will therefore focus on identifying the relevance of the concept of community in ASBOs and its role in determining liability, while the second half will explore the theoretical principles underlying such a model of liability, using the example of ASBOs to illustrate the practical implications of its application.

The object of this work is therefore not necessarily to provide a justification for the creation and use of the orders, although it will speak to some extent to their normative attractiveness.<sup>17</sup> Rather, this work aims to provide a better understanding of how ASBOs function as a legal mechanism, drawing on a model of community-based liability which can both rationalise and optimise the use of the orders. As such, this

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<sup>16</sup> The concept of community does not have one straightforward definition, from either a sociological or legal perspective (see ch 4, n 120), and this thesis will draw from existing discussions of the concept to identify the most relevant approach based on the socio-legal concept of community as a 'web of understanding', developed by Cotterrell.

<sup>17</sup> Chapter 5 in particular will critically assess some examples of the orders' application in the light of the theoretical principles developed in chapter 4.

thesis is not ultimately focused on the reasons why ASBOs have been introduced,<sup>18</sup> nor does it engage directly with the sociological and criminological debate over the way they have been applied. Many commentators have, over recent years, criticised the orders' application in practice, denouncing the enforcement-driven approach and the lack of adequate support measures for those most at risk, as well as the stigmatisation it has created of vulnerable groups such as young people and those with mental health issues or disabilities.<sup>19</sup> Although recent studies have also shown a more nuanced application of ASBOs in practice, it is generally accepted that their impact has been problematic.<sup>20</sup>

Notwithstanding, this work focuses on the legal nature of ASBOs, and considers their application or practical context only in so far as the interpretation of legal provisions is concerned.<sup>21</sup> As such, the analysis conducted speaks more to the structure of the liability which ASBOs impose than to the content of that liability.<sup>22</sup> This is not to deny the fact that ASBOs have, at best, a chequered legacy, however, the focus of this work is on the legal and normative implications of ASBOs for individual liability.

## II. Structure of the thesis

This thesis is divided into two parts and five chapters. The first three chapters focus on the dual nature of ASBOs and the role of the concept of community in them, from a doctrinal, political and judicial perspective. The last two chapters draw from

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<sup>18</sup> As opposed to Ramsay's work on the historical and political principles behind the introduction of the orders (n 14).

<sup>19</sup> See in particular Elizabeth Burney, *Making People Behave* (2<sup>nd</sup> ed, Willan Publishing 2009) and Peter Squires and Dawn E. Stephen, *Rougher Justice: Anti-Social Behaviour and Young People* (Willan Publishing 2005).

<sup>20</sup> Sarah Hodgkinson and Nick Tilley, 'Tackling anti-social behaviour: Lessons from New Labour for the Coalition Government' (2011) 11(4) *Criminology and Criminal Justice* 283; Laurence Koffman, 'The Use of Anti-Social Behaviour Orders: An Empirical Study of a New Deal for Communities Area', [2006] *Crim LR* 593, Jane C Donoghue, 'Anti-social behaviour, community engagement and the judicial role in England and Wales' (2012) 52(3) *Brit J Criminology* 591.

<sup>21</sup> Although this approach also brings up some of the issues surrounding the orders' problematic impact, in particular in relation to those with mental health problems; see ch 5, text to n 27 and further.

<sup>22</sup> Duff makes the distinction in *Answering for Crime* to outline the implications of his approach to criminal liability: 'my concern here is with the structure more than with the content of the criminal law,' R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 146.

that analysis to expose a model of community-based liability, creating a framework through which to examine the practical example of the orders.

### **A. Part 1: Unveiling the role of the concept of community in ASBOs**

The aim of the first chapter is to introduce ASBOs and present the hypothesis that this thesis will seek to prove. The first step will be to show that the mixture of civil and criminal law in ASBOs is a defining feature and creates a truly hybrid legal instrument which is neither fully civil nor criminal. As a result, existing academic critiques of the orders, in which the analysis has had as either a principally civil or criminal focus, fail to adequately reflect the orders' nature. The second part of the chapter will aim to provide a better understanding of the significance of the hybrid nature of the orders, by using two other examples of legal instruments mixing civil and criminal law: civil contempt and public nuisance injunctions. The analysis and comparison of these examples shows that ASBOs are not a freak occurrence but that other legal instruments have been developed purposefully by mixing civil and criminal elements.

The way those elements interact in the different hybrid measures suggests that the civil and criminal law represent more of a continuum, along which these measures can be placed. The dual nature of ASBOs is a reflection of the fact that hybrid instruments seek to embrace and address a specific relationship, rather than the generic relationship traditionally summoned up by the civil or criminal law. Rather than focusing on the relationship between individuals (civil law) or between an individual and the state (criminal law), ASBOs seek to regulate individuals' relationships with a particular community. This calls for more flexible procedures and a less formal dialogue in the imposition of responsibility, with a more constructive approach, rather than a strictly condemnatory one which traditionally characterises the criminal law. The most obvious application of this community relationship is drawn from geographical communities and in particular council estates or neighbourhoods, but, crucially, can derive from a much wider set of social interactions which create community bonds. It is the exploration of the potential for regulation of this more focused and adaptable notion of community which lies at the heart of this thesis.

The second chapter aims to present ASBOs in more detail and explore how the identification of a community relationship in need of regulation can be inferred from their political genesis. Their dual nature can be understood in this light, representing a tool for targeting a specific type of behaviour harmful to a particular community, and thus regulating an individual's relationship with that community. This idea of combining civil and criminal law to tackle problematic behaviour in council estates and small neighbourhoods had already emerged in the decade before the introduction of ASBOs, highlighting the new emphasis on the effects of behaviour on the community rather than simply any *a priori* wrongful or harmful nature.

Although the introduction of the ASBO was often simplistically portrayed in political discourse as filling a 'gap' left vacant by civil and criminal justice, the significance of the civil and criminal nature of the orders goes beyond the political rhetoric and communication exercise. The analysis of the policy and legislation of ASBOs shows that community relationships represent a clear focus of the liability imposed through the use of dual orders and ASBOs in particular. Specific procedural characteristics of the orders and the flexible legal definition of the concept of 'anti-social behaviour' represent a means to take into account an individual's relationship with the particular community affected by his behaviour when holding him accountable for its impact. However, in trying to widen the notion of community relationships beyond the narrow definitions of council estates and small neighbourhoods, the legislator shied away from providing a clear definition of the concept of community as a relationship ASBOs are intended to regulate when imposing liability. While the nature of that relationship is hinted at and can be partially uncovered by studying the orders' terms and their political origins, the legislation's reliance on flexibility and judicial discretion arguably created a degree of uncertainty in their representation of the concept of community in ASBOs.

The third chapter will then go on to explore how that discretion has been used in practice, and study the existing case law relating to ASBOs to shed some light on the role the concept of community plays in the way the orders are applied. The judicial interpretation of ASBO legislation has sought to confirm their hybrid nature, validating the legislator's vision regarding the combination of civil and criminal law to be used to regulate individual behaviour in a particular community context.

Analysis of reported case law further exposes the central role of the concept of community and its significance in relation to the way the orders have been applied and interpreted. Four specific characteristics are identified:

- Firstly, case law manifests a redefinition of individual responsibility, focusing not on subjective choice but on the overall effect of a course of conduct and on the individual's relationship with those affected by his behaviour;
- Secondly, case law also demonstrates a characterisation of harm which derives from a course of behaviour's impact on a particular community rather than its interference with predetermined individual interests in general;
- Thirdly, the broad discretion written into the definition of ASBOs has been exploited by the courts to generate a flexible and pragmatic approach to the orders' application in general. The context of each case and the responsible individual's relationship with those affected by his behaviour often plays a crucial part in the courts' effort to achieve a fair result;
- Finally, the courts have emphasised the importance of the communicative function of the orders to issue clear rules of behaviour to the individual and reassure and empower the community. This communicative function is based on and enhanced by the relationship between the responsible individual and the particular community affected by his behaviour.

Based on this analysis, the orders can therefore be seen as seeking to regulate a different type of relationship to other models of liability: that between an individual and a particular community. This, it is suggested, supports the hypothesis that ASBOs represent a model of liability distinct from civil and criminal liability. The second part of the thesis therefore goes on to explore the theoretical principles underlying such a model of community-based liability, using the example of ASBOs as an illustration of how it can be applied in practice.

## **B. Part 2: Developing a Model of Community-Based Liability as a Frame of Reference to Assess ASBOs**

Chapter four starts by exploring the role of community relationships in the context of individual responsibility from a theoretical perspective, examining the principles

underlying the imposition of liability and the figure of the responsible individual. The primacy of liberal individualism necessitates a focus on the relationship between an individual and the state when defining his responsibility and the imposition of criminal liability, to the exclusion of his relationship with his social environment. Exploiting communitarian principles, which analyse social interactions as constitutive of an individual's identity, a figure of the responsible individual can be outlined, shaped by his social interactions while still preserving his autonomy. In order to provide a basis for liability, I suggest that the concept of community can be best understood via the socio-legal concept of a 'web of understanding'. This concept seeks to represent the complexity and flexibility of modern social relations and isolates specific shared interests as the defining characteristic of a given community.

Based on these principles, the outline of a model of community-based liability, and how it would operate in practice, can be drawn. Two key elements are identified which will determine the imposition of liability: the nature of subjective individual responsibility, and the type of harmful behaviour which will give rise to liability. In contrast with criminal liability, individual responsibility will be determined by the individual's wilful engagement with the community in question, rather than relying on subjective notions of guilt relating to the act itself. The notion of wilful engagement makes the way an individual forms a relationship with the community affected by his behaviour the central feature of his liability. The importance of that relationship also informs the characterisation of the type of behaviour that will give rise to community-based liability. This behaviour will be defined by the harm it causes a given community, rather than merely its causing of offence or its violation of predetermined individual interests as is generally the case in criminal liability. The conceptualisation of communities as defined by a range of interests linking individual members together – the 'web of understanding' – provides a measure to identify behaviour that is harmful to a given community: interference with that community's interests will give rise to individual liability.

In chapter five, the practical example of ASBOs can be re-examined through the lens of these two defining elements. First of all, the way the courts have interpreted the subjective requirement of responsibility in ASBOs reflects the idea of an individual's wilful engagement with a particular community to establish his liability, by focusing on the actual interaction between that individual and the community

affected. However, in some cases the use of ASBOs to tackle low-level criminal behaviour has led to situations in which the individual's ability to engage with the community is doubtful, underlining potential misapplications of the principles of community-based liability.

Secondly, the concept of anti-social behaviour has been refined to include considerations of its harmful impact on a particular community. Specific examples of the nature of those community relationships in ASBOs provide an illustration of the types of interests that define communities, and the violation of which can lead to liability. These interests include local proximity but also instrumental or professional association and, to some extent, affective relationships. In some cases, however, the harm caused to a given community is not identified clearly enough, making the imposition of liability more subjective and potentially moralistic. This can be because the community whose interests are being considered is defined too broadly, or if the interests taken into account do not represent a relevant community relationship.

This analysis of ASBOs provides a different framework through which to reassess the original hypothesis regarding the orders' purpose. In particular, the orders' dual nature provides a more flexible approach to the regulation of individual behaviour, mirroring his relationship with a particular community. The communicative nature of ASBOs also illustrates the value in using a dual step order to foster and potentially enhance that relationship.

The picture which emerges of liability in the context of ASBOs is therefore a qualified one: whilst the orders can be justified by a model of community-based liability which seeks to regulate the relationship between an individual and a particular community, their use also highlights the possible flaws and limitations of such a model of liability. In practice, these misapplications can be related to a lack of appropriate guidance regarding the orders' purpose and application, including the role of the concept of community in shaping individual responsibility. As such, ASBOs can be seen as a missed opportunity rather than an unprincipled imposition of liability, as per early academic commentary, or an outright failure, as is suggested by the government's successful efforts to abolish them. In fact, the principles underlying a community-based model of liability could provide a useful guide when considering the application of the new measures recently created to target anti-social behaviour.



## **CHAPTER 1 – ASBOs AND THE CIVIL/CRIMINAL DISTINCTION: UNCOVERING THE COMMUNITY THREAD**

The aim of this chapter is to introduce ASBOs and present the hypothesis that this thesis will seek to prove.

First, it will be demonstrated that the mixture of civil and criminal law is the defining feature of ASBOs, creating a truly hybrid legal instrument. The idea of hybrid orders to tackle anti-social behaviour, developed prior to and concretised by the Crime and Disorder Act 1998, mixes the procedural advantages of an initial civil injunction to the threat of a discrete criminal offence upon breach of the terms of the order. This hybrid form was validated by the House of Lords in the case of *McCann*, which not only accepted that Parliament had intended to create an instrument that combined criminal and civil elements, but increased the degree of overlap between these two elements in the orders by imposing a criminal standard of proof with the initial civil injunction. It was a decision made on formal and substantive grounds, based on what the Lords saw as a significant ‘social problem’ calling for a specific combination of civil and criminal law.

The second part of this chapter will examine the relevance of the hybrid nature of the orders by exploring other legal instruments which mix civil and criminal law: civil contempt and public nuisance injunctions. The analysis and comparison of these examples with a traditional model which assumes a strict separation of the civil and criminal law demonstrates that ASBOs are not strictly *sui generis*, but that other legal instruments have been developed purposely by mixing procedural or functional elements of the civil and criminal law. In each example, these elements have been purposefully combined, creating distinct legal measures, which cannot be clearly categorised as either fully civil or criminal. Instead, the measures sit on a continuum of measures to control individual behaviour, and their existence suggests that a rigid,

dichotomous distinction between civil and criminal law, with legal categories based only on procedure or function, is insufficient for understanding either them or ASBOs.<sup>1</sup>

The final section of this chapter will explore how existing academic critiques and analysis of ASBOs have focused on the dichotomised vision of civil and criminal law, eschewing the hybrid nature of the orders. As a result, the fundamental relationship at the heart of ASBOs has been frequently overlooked. The dual nature of ASBOs was designed to address a different type of relationship from those traditionally addressed by the civil or criminal law. Instead of the relationship between individuals (civil law) or between an individual and the state (criminal law), ASBOs seek to regulate individuals' relationship with a particular community. The best-known examples are geographical communities—in particular council estates or neighbourhoods—but they can also comprise a much wider set of social interactions which create community bonds. This chapter will argue that ASBOs can be more comprehensively understood through the community framework.

## **I. The Dual Nature of ASBOs – Challenging Existing Models of Liability**

This section will present the dual character of ASBOs, based on the relevant legal provisions and their interpretation by the House of Lords in the case of *McCann*.

### **A. The Law**

From a legislative perspective, ASBOs clearly represent an intentional combination of civil and criminal elements. The use of a civil injunction in the initial stages provides both procedural advantages and substantive flexibility in the application and phrasing

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<sup>1</sup> Baker discusses the idea of a continuum between civil and criminal law and identifies various aspects to this continuum: 'continuum of culpability and the continuum of the nature and seriousness of the harm', but also "continuum of fairness of enforcement"; overall, 'civil law shares with the criminal law the aim of deterring people from harming others', Dennis Baker, *Textbook of Criminal Law* (Sweet & Maxwell 2012) chapter 1.7, 37-38.

of the orders. The creation of criminal offence for breach of an order adds teeth to the injunction and conveys the gravity of the anti-social behaviour.

## **1. An introduction to ASBOs**

Anti-social behaviour orders were introduced by the Crime and Disorder Act 1998 (the CDA). Section 1(1) of the CDA states that an order shall be made if it appears that:

the person has acted ... in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons...

The order has to be necessary 'to protect relevant persons from further anti-social acts by him.'<sup>2</sup> Any act that the defendant can show was 'reasonable' in the circumstances shall be disregarded by the court, although there is no specific *mens rea* or 'guilt' requirement.<sup>3</sup>

The ASBO was one of the first and most prominent examples of a new breed of so-called Civil Preventative Orders (CPOs) which have flourished since 1998.<sup>4</sup> A CPO is a civil order made by the Magistrates' Court, upon application or conviction, and which 'prohibits the defendant from doing anything described in the order.'<sup>5</sup> If the order is breached, the defendant will be found guilty of a criminal offence unless he can show that his behaviour was reasonable in the circumstances.<sup>6</sup> The sentences available upon conviction range from a fine or a community order to a maximum of five years' imprisonment.<sup>7</sup>

ASBOs therefore comprise two separate steps, which form a single course of action to prevent and potentially punish 'anti-social behaviour.' As the Home Secretary

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<sup>2</sup> Crime and Disorder Act 1998 (CDA 1998) s1(1)(b), as substituted by Police Reform Act 2002 (PRA 2002) c. 30 Pt 4 c.2 s.61(2).

<sup>3</sup> CDA 1998, s 1(5).

<sup>4</sup> The term was coined in Stephen Shute, 'The Sexual Offences Act 2003: (4) New Civil Preventative Orders - Sexual Offences Prevention Orders; Foreign Travel Orders; Risk of Sexual Harm Orders' [2004] Crim LR 417; examples include, but are not limited to, Parenting Orders, Serious Crime Prevention Order, Non-Molestation Orders, Risk of Sexual Harm Orders.

<sup>5</sup> CDA 1998 s1(4).

<sup>6</sup> Similar to the initial civil injunction, there is no specific *mens rea* requirement to the offence, CDA 1998 s1(5).

<sup>7</sup> The characteristics of ASBOs are discussed in more details in chapters 2 and 3.

argued when defending the Bill in the House of Commons, the creation of these orders was seen as a deliberate policy choice to ‘mix the best of the civil and criminal law.’<sup>8</sup> Other advocates attributed the need for ASBOs to failures of both civil law, seen as too soft, and criminal law, which was considered too cumbersome to operate in the courts and unable to capture the harmful behaviour because of its low-level but repetitive nature.<sup>9</sup> The creation of the orders was seen as a two-step solution, operating at both a procedural and functional level, combining the swift, uncomplicated procedural rules attached to civil injunctions with the strength and moral voice of the criminal law to condemn the behaviour if the order is breached.

## **2. The dual nature of ASBOs**

### ***a) Civil injunction***

The procedural advantages of an initial civil injunction were meant to create a simpler and more efficient process. This included the use of hearsay evidence when applying for an order, considered an essential feature given that ASBOs were designed to target harmful behaviour against victims who were neighbours, many of whom would be too scared to testify.<sup>10</sup> With ASBOs, professional witnesses such as local neighbourhood police officers are authorised to testify to the existence of the anti-social behaviour in the hearing regarding the granting of an order.<sup>11</sup> Another perceived advantage of the civil nature of the injunction is that it grants a wider range of agencies the ability to apply for an order, from local authorities and police forces, to social landlords and, more recently, environmental agencies.

The civil nature of ASBOs was also chosen for the flexibility it allows. Terms imposed can include any prohibition deemed ‘necessary’ by the courts to prevent

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<sup>8</sup> HC Deb 16 December 1996, vol 287, col 791.

<sup>9</sup> This was often referred to as the existence of a ‘justice gap’, see ch 2, text to n 70.

<sup>10</sup> This was particularly so in the initial policy document Labour Party, ‘A Quiet Life: Tough Action on Criminal Neighbours’ (1995).

<sup>11</sup> In practice, the overwhelming majority of the orders are applied for by police and local authorities: according to Home Office figures, they account for over 90% of all applications for orders, and within those 90%, most applications are made by local authorities. Official statistics gathered by the Home Office and Ministry of Justice, ‘Anti-social behaviour order statistics: England and Wales 2013’, published 18 September 2014, <<https://www.gov.uk/government/statistics/anti-social-behaviour-order-statistics-england-and-wales-2013>> (last accessed 13 January 2015).

further anti-social behaviour by the defendant, allowing judges to define the terms of the injunction according to the specific circumstances. Section 1(6) of the CDA states that:

[t]he prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting persons (whether relevant persons or persons elsewhere in England and Wales) from further anti-social acts by the defendant.

The inherent flexibility of the civil process allows the orders to be ‘tailor-made’ for each individual, considering both the nature of his behaviour and his personal circumstances. For example, if the courts decided that excluding the individual from a particular area was necessary to curb anti-social behaviour, the fact that members of his close family resided in this area could—although by no means necessarily would—affect the delimitation of the exclusion zone.<sup>12</sup>

Flexibility is also found in the lack of definition of the concept of anti-social behaviour, kept purposefully broad in the CDA. Section 1(1)(a) of the CDA states that an order may be granted if an individual’s behaviour has caused or is likely to cause ‘harassment, alarm or distress’ to one or more person. The breadth of the definition was meant to protect the discretion of enforcement agencies and the courts when interpreting the provisions, and give a wide range of options to those granting ASBOs. As government minister at the time Alun Michael explained to the House of Commons, a ‘widely drawn legislation with clarity of purpose and with clear expectation placed on those who use it, can be a flexible method.’<sup>13</sup>

In practice, this means that the behaviour targeted by anti-social behaviour orders can represent both lawful and unlawful conduct, and even conduct which is otherwise deemed a criminal offence.<sup>14</sup> By extension, the discretion contained in section 1(6) to impose any prohibitions necessary to prevent the commission of further anti-social

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<sup>12</sup> The judicial interpretation of this provision, and the limitations that have been imposed by the courts will be discussed in more details in ch 3, section IID1.

<sup>13</sup> SC Deb (B) 30 April 1998, col 46; see ch 2, text to n 142 for a more detailed discussion of the political background to ASBOs’ legal definition.

<sup>14</sup> This overlap in nature was reinforced in 2002, when the PRA 2002 allowed for ASBOs to be granted on conviction for a criminal offence (include cross reference to first mention of accurate section). These orders became known as CrASBOs or ‘Criminal ASBOs’, although the behaviour leading to the imposition of the order does not need to be criminal: the order will be granted for anti-social behaviour as defined normally, but will be imposed in the context of a criminal conviction. For more details on this variation, see ch 2, text to n 127.

acts has been interpreted very loosely. The terms of the order can include prohibitions on committing lawful acts related to the behaviour in question (e.g. a graffiti artist might be excluded from a particular zone or be forbidden to carry a can of paint) or prohibitions on committing acts which would otherwise be a criminal offence.

### ***b) Criminal offence***

Once the ASBO has been granted, any breach of the terms for which the defendant cannot provide a 'reasonable excuse' will result in the commission of a specific criminal offence according to section 1(10) of the CDA:

If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he [is guilty of an offence and] liable—  
(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or  
(b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

This criminal offence upon breach, punishable by up to five years in prison, was seen by Parliament as a necessary addition to ensure that any violation of the terms of the order would be treated seriously. If sentence length theoretically correlates with the gravity of an offence, a five year sentence of imprisonment strongly suggests the seriousness with which Parliament considered the breaching of an ASBO.<sup>15</sup> In addition, the offence would be prosecuted by the Crown Prosecution Service. Indeed, the addition of a criminal element to the initial civil injunction suggests that the purpose of the order is not only to encourage the respect of the injunction, but also to inflict a specific retributive punishment if the injunction is breached. As a result, punishment in this context appears to be for the failure to observe the terms of the order, as well as, indirectly, for the harm created by the anti-social behaviour itself.

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<sup>15</sup> Imposing a five year sentence also made the offence an arrestable offence at the time, according to section 24 of the Police and Criminal Evidence Act 1984 – see Home Office, 'Community Safety Orders, A Consultation Paper' (1997).

## **B. Upholding the Dual Nature of ASBOs as a ‘Legislative Technique’ – the House of Lords’ Decision in *McCann***

The most important judicial decision in relation to the orders was given by the House of Lords in the first and only case dealing with ASBOs to have reached the House of Lords, and set the tone for the way the courts have interpreted and applied ASBOs since.<sup>16</sup> The *McCann* decision in 2003 not only explicitly upheld the CDA’s vision of ASBOs as dual orders mixing both civil and criminal elements, it also created an additional degree of overlap between the two parts of the orders. Despite the civil characteristic of the initial injunction, the House of Lords ruled that a criminal burden of proof should be imposed regarding the finding of anti-social behaviour justifying the imposition of an order.

The decision in *McCann* related to two separate sets of facts, both of which highlighted typical instances of anti-social behaviour which ASBOs and their dual structure were intended to target.<sup>17</sup> In each case, a strong set of direct and hearsay evidence showed that the recipients (or intended recipients) of the orders had caused significant distress to others in their neighbourhoods through a variety of criminal and non-criminal behaviour. These types of anti-social behaviour, their localised settings and the range of evidence used, all help illustrate the underlying rationale behind the creation of the orders.<sup>18</sup> This vision of the facts as a particular ‘social problem’ was explicitly adopted by the Lords in their reasoning and affected their decision with regards to the legal nature of the orders. In the following section, the facts of each case will be presented, before examining the decision and the significance of the orders’ reaffirmed hybrid nature in each judgment.

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<sup>16</sup> *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39, [2003] 1 AC 787 (*McCann*).

<sup>17</sup> The first set of facts referred to the McCann brothers, and the second to a defendant named Clingham; as one commentator put it, ‘it was defendants like the McCann brothers and Andrew Clingham that [New Labour] had in mind’ when the ASBO was devised, Stuart MacDonald, ‘The Nature of the ASBO – *R (McCann & others) v Crown Court at Manchester*’ (2003) 66 MLR 630.

<sup>18</sup> For a more detailed exploration of the political rationale for introducing the orders, see chapter 2.

## 1. The facts

In the first case, the three McCann brothers—aged 13, 15 and 16—lived near Manchester. Over the course of five months, police forces in the area collected a range of evidence of their anti-social behaviour and applied for ASBOs in consultation with the local authority. The evidence comprised four specific and direct accounts of anti-social and alleged criminal behaviour, four incidents which were recorded by the police based on anonymous hearsay evidence,<sup>19</sup> and direct evidence from three different police officers recounting instances of reckless driving, participation in the theft of a handbag and the use of threatening and abusive language against others.

The contribution of hearsay evidence was found to be ‘not perhaps crucial,’ but ‘certainly significant.’<sup>20</sup> According to Lord Hope of Craighead, who presented these facts, the ‘overall picture’ was one of a ‘prolonged course of behaviour which caused or was likely to cause harassment, alarm or distress to many people in local government area.’<sup>21</sup> Based on this evidence, the three brothers were each given an anti-social behaviour order which prohibited them from:

- (i) entering a specific area around Beswick, where the defendants resided;
- (ii) using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour in any public place in the City of Manchester;
- (iii) threatening or engaging in violence or damage against any person or property within the City of Manchester; and
- (iv) encouraging any other person to engage in any of those acts in the City of Manchester.

The orders were made by a stipendiary magistrate, and were confirmed by the Crown Court upon appeal by the defendants. The appeal was made on the grounds that the proceedings under section 1(1) of the CDA should have been classified as

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<sup>19</sup> These included one instance of burglary, one instance of criminal damage of a car, throwing things off a scaffolding and an instance of abusive behaviour.

<sup>20</sup> *McCann* (n 16), [50] (Lord Hope of Craighead).

<sup>21</sup> *ibid*, [49].



criminal under domestic law and for the purpose of article 6 of the European Convention on Human Rights (the ECHR). The Recorder of Manchester in the Crown Court rejected this argument, followed by Lord Woolf CJ in the Divisional Court,<sup>22</sup> and finally the Civil Division of the Court of Appeal,<sup>23</sup> leading to the defendants' appeal to the House of Lords.

In the facts of *Clingham*, the defendant was a 16-year-old living in the Kensington and Chelsea borough of London and accused of persistent criminal and anti-social behaviour in a specific area of that borough. The evidence against him was both first hand from known (but undisclosed) and anonymous sources, as well as hearsay evidence based on police reports related to a 'wide range of behaviour, from allegations of verbal abuse to serious criminal activities including assault, burglary, criminal damage and drug-dealing, material [which] in its cumulative effect was ... logically probative of the statutory requirements under section 1' of the CDA.<sup>24</sup> In the process of applying for an ASBO, supporting material and a hearsay notice was eventually served on the defendant, who challenged the validity of the latter. The case progressed to the Divisional Court<sup>25</sup> where Schiemann LJ rejected the pre-trial argument that the evidence did not amount to hearsay evidence, but ruled that the proceedings in question were not criminal proceedings under domestic law or article 6.<sup>26</sup> Consequently, the hearsay evidence could be admitted for the Court to consider its relative weight and probative value.

The appeal to the House of Lords challenged the decision by the Divisional Court, claiming in accordance with the defendants in the *McCann* case that the proceedings leading to the imposition of an ASBO represented criminal proceedings both under domestic law and article 6 of the ECHR, and as such should be subject to the required safeguards for such proceedings, including the unavailability of hearsay evidence.

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<sup>22</sup> *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 358.

<sup>23</sup> *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084.

<sup>24</sup> *McCann* (n 16), [8] (Lord Steyn).

<sup>25</sup> [2001] EWHC Admin 1, the details of the appeal process, which focuses on procedural matters relating to hearsay evidence, are not directly relevant to the House of Lords' final decision of the case and will therefore not be outlined here.

<sup>26</sup> Unreported decision, discussed *McCann* (n 16), [9] and [10] (Lord Steyn).

## 2. The decision

### *a) ASBOs' civil and criminal nature*

From the two appeals, a number of specific and overlapping questions emerged for the House of Lords to examine. According to Lord Steyn:

the principal general and common questions are:

- (a) Whether as a matter of domestic classification proceeding leading to the making of an ASBO are criminal in nature; and
- (b) Whether under article 6 ECHR such proceedings involve 'a criminal charge.'

Underlying these questions are two specific issues, namely:

- (c) Whether under section 1 of the Act hearsay evidence is admissible in proceedings seeking such an order;
- (d) What the standard of proof is in such proceedings.<sup>27</sup>

Questions (a) and (b) concerned both cases directly, and although question (c) concerned principally the *Clingham* case and question (d) concerned principally the *McCann* case, counsel for the defendants adopted the same line of argument and the Lords did not distinguish between the cases in their reasoning and decision.<sup>28</sup> The appeals were unanimously rejected, upholding the orders granted against the McCann brothers and imposing an order against Mr Clingham. Lord Steyn, Lord Hope of Craighead and Lord Hutton each gave a separate opinion.

First to be addressed was question (a), relating the domestic classification of the orders. This was initially answered by Lord Steyn, who found that the proceedings to obtain an ASBO were civil proceedings under domestic law.<sup>29</sup> The lack of criminal proceedings played a significant part in the reasoning, highlighting the existence of two distinct procedural phases between the initial injunction and the criminal offence for breach. This was emphasised by the fact that 'conviction and punishment will only be imposed if the defendant, by his own choice, subsequently breaches the order and

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<sup>27</sup> *McCann* (n 16), [4].

<sup>28</sup> This included counsel for the McCann brothers and Mr Clingham, but also the human rights association Liberty who was a party to the proceedings.

<sup>29</sup> *McCann* (n 16), [27].

separate and distinct processes are brought against him.’<sup>30</sup> Lord Steyn also found the intention of Parliament to clearly be in favour of the proceedings being civil, as shown through its labelling of the different sections of the CDA,<sup>31</sup> as well as the deliberate choosing of civil procedure in the context of the Scottish equivalent of the orders.<sup>32</sup>

Despite the classification of the orders as civil under domestic law, question (b) required a further examination of the proceedings from the perspective of the ECHR.<sup>33</sup> Article 6(1) of the ECHR stipulates the right of all individuals to a fair trial ‘in the determination of his civil rights and obligations or of any criminal charge against him.’ In the case of a criminal charge, additional safeguards will apply, including the principle of the presumption of innocence,<sup>34</sup> as well as a list of additional procedural safeguards.<sup>35</sup> The appellants’ argument was that the orders were in fact criminal charges, which called for the additional safeguards of article 6(3).

According to the European Court of Human Rights’ jurisprudence, three criteria must be taken into account when determining whether a provision represents a criminal charge for the sake of Convention rights: their classification under domestic law – already addressed in question (a), the nature of the offence itself, and the nature and degree of severity of the penalty.<sup>36</sup> The House of Lords found that the orders were not properly characterised as a criminal charge under any of the three criteria, thereby releasing them from the related requirements of article 6. It was held that the orders

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<sup>30</sup> *McCann* (n 16), [95] (Lord Hutton); Lord Steyn also emphasised the procedural criteria when distinguishing between civil and criminal measures, *ibid*, [19]. See next section for more detail on the procedural distinction between civil and criminal law.

<sup>31</sup> Lord Hutton makes the distinction between Part I, which is labelled ‘Prevention of Crime and Disorder’, whereas Part II is under the heading of ‘Criminal Law’, *McCann* (n 16) [97].

<sup>32</sup> *ibid*, [52] - [56], Lord Hope of Craighead discusses the Scottish procedures relating to civil and criminal proceedings, which shows clearly, according to him that Parliament intended the procedure to be civil.

<sup>33</sup> As Lord Hope notes, ‘the fact that the proceedings are classified in our domestic law as civil [...] provides no more than a starting point’ to the question, *McCann* (n 16), [57].

<sup>34</sup> Article 6(2): ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’

<sup>35</sup> Article 6(3) states ‘everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

<sup>36</sup> *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678-679 [82]-[83]; *Benham v United Kingdom* (1996) 22 EHRR 293, 323 [56].

do 'not involve the bringing of a charge because the purpose of the procedure is to impose a prohibition, not a penalty,' both in principle and substance.<sup>37</sup> ASBOs were distinguished from proceedings where a person may be bound over to keep the peace, and which the ECHR had previously found involved the determination of a criminal charge, due to the immediate risk of imprisonment associated with the proceedings.<sup>38</sup> As a result, the orders' initial civil injunction was considered to be distinct from the related criminal offence, and the punitive element contained in the commission of an offence under section 1(10) did not warrant the requalification of the orders as a criminal penalty according to ECHR principles.<sup>39</sup>

The decision regarding the admissibility of hearsay evidence—question (c)—flows from the classification of the orders as civil under both domestic and convention law.<sup>40</sup> One of the safeguards of article 6(3) includes the defendant's right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.' The consequence of this positive right is that, in criminal proceedings, hearsay or indirect evidence is not admitted, as it would violate the defendant's right to cross-examine witnesses. Civil proceedings, on the other hand, are exempt from these restrictions, and the law of England and Wales allows for the use of hearsay evidence in civil proceedings.<sup>41</sup> The qualification of the orders as civil under domestic and European law therefore called for a positive answer to question (c), allowing the use of hearsay evidence in the proceedings under section 1 of the CDA. Beyond the legislative justification, hearsay evidence was also found to 'be necessary in many cases if the

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<sup>37</sup> *McCann* (n 16), [68] (Lord Hope) and *ibid*, [68] to [74]

<sup>38</sup> *Steel v UK* (1998) 28 EHRR 603, 635-636, [48]-[49].

<sup>39</sup> The decision has been criticised in relation to its application of human rights legislation, and its interpretation of ECHR jurisprudence, see in particular Andrew Ashworth, 'Social Control and 'Anti-Social Behaviour': The Subversion of Human Rights' (2004) 120 LQR 263, Geoff Pearson, 'Hybrid Law and Human Rights' (2006) 27 (2) Liverpool LR 125, and Chara Bakalis, 'Asbos, "Preventative orders" and the European Court of Human Rights' (2007) 4 European Human Rights Law Review 427.

<sup>40</sup> The issue was dealt relatively succinctly by all three judges, although Lord Hope of Craighead and Lord Hutton both also addressed the related issue of whether the proceedings in fact dealt with the determination of civil rights, and were therefore subject to safeguards included in article 6(1). Both found that the orders did not threaten an individual's civil rights and therefore did not call for the protection of article 6(1). Lord Hutton in particular invoked the need to strike a 'fair balance' between the rights of the community affected by the behaviour and those of the defendant, an argument which will be discussed further in the third section of this chapter.

<sup>41</sup> Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999.

magistrates are to be properly informed about the scale and nature of the anti-social behaviour and the prohibitions that are needed for the protection of the public.’<sup>42</sup>

Finally, the House of Lords dealt with question (d) about the standard of proof applicable to the proceedings under section 1 of the CDA. It was held that despite their civil nature, the application of a higher standard of proof could be justified where the alleged conduct was quasi-criminal and could have serious consequences if proved.<sup>43</sup> Heightened standards of civil proof had generally been applied by the lower courts when deciding whether anti-social behaviour had been proven, and while Lord Steyn admitted that this would generally prove a sufficient safeguard, ‘pragmatism’ called for the criminal burden of proof to apply in order to make judges’ task more straightforward.<sup>44</sup>

### ***b) The dual nature of ASBOs’ and the ‘social problem’ of anti-social behaviour***

As the preceding sections show, the House of Lords chose to endorse Parliament’s vision of ASBOs’ nature almost unequivocally. It relied on the distinction between the preventative purpose of the orders and their punitive effects to reject the claim of ECHR violation, a decision which has been condemned as a subversion of human rights legislation.<sup>45</sup>

Nevertheless, in both cases it found that the orders’ initial injunction represented civil proceedings, which were then followed by a distinct and separate criminal charge should the defendant breach the terms of the order. Not only did *McCann* reaffirm ASBOs civil and criminal nature, it also created a further degree of overlap between

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<sup>42</sup> *McCann* (n 16), [77] (Lord Hope of Craighead).

<sup>43</sup> ‘it is not an invariable rule that the lower standard of proof must be applied in civil proceedings’, *ibid*, [83].

<sup>44</sup> Lord Steyn also emphasised that the criminal burden of proof only applied to section 1(1)(a), which relates to the existence of anti-social behaviour, but not to section 1(1)(b) which calls for an exercise of ‘evaluation and judgment’ in determining whether an order will be necessary, *McCann* (n 16), [37].

<sup>45</sup> Although one commentator argues that specific tenets of ECHR jurisprudence on the question was misapplied, see Bakalis (n 39), criticism focuses on the way the court eventually balanced the orders’ preventative purpose and punitive effect, arguing that the latter should have overridden the former, and that the court drew an ‘artificial and overly simplistic line’ between the two, Pearson (n 39), 140; whilst it is an important question in relation to human rights law, the validity or otherwise of this argument does not have a direct bearing on the approach taken in this thesis, as it does not affect the actual nature of the liability attributed to ASBOs.

the two components, by imposing a criminal burden of proof in the initial civil proceedings.<sup>46</sup>

Both in form and substance, the House of Lords acknowledged and enforced the legislative vision and intention of ASBOs, mostly without questioning it.<sup>47</sup> All three judgments made explicit references to the context in which the legislation was introduced and the issues it was meant to address. Lord Steyn and Lord Hutton in particular painted a stark picture of what they saw as the ‘grave social problem’<sup>48</sup> of anti-social behaviour, and saw the orders as ‘important social legislation designed to remedy a problem which the existing law failed to deal with satisfactorily.’<sup>49</sup>

Lord Hope took a slightly different perspective in his judgment, focusing on the rights and freedoms involved in the proceedings, but also saw the use of civil proceedings and hearsay evidence as ‘valuable safeguards’ deemed necessary in the face of the ‘unacceptable social disruption which [anti-social] behaviour creates.’<sup>50</sup> The existence of a social issue underlying the introduction of the orders was therefore, in the Lords’ opinion, directly related to the civil nature of the initial orders, and their combination of civil and criminal law. This connection was made explicit by Lord Steyn who deemed the orders a ‘legislative technique’ directly associated with the ‘social problem’ caused by anti-social behaviour. In his mind:

there [was] no doubt that Parliament intended to adopt the model of a civil remedy of an injunction, backed up by criminal penalties ... . The view was taken that the proceedings for an anti-social behaviour order would be civil and would not attract the rigour of the inflexible and sometimes absurdly technical hearsay rule which applies in criminal cases. If this supposition was wrong, in the sense that Parliament did not objectively achieve its aim, it would inevitably follow that the procedure for obtaining anti-social behaviour orders is completely or virtually unworkable and useless.<sup>51</sup>

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<sup>46</sup> According to JC Smith, this part of the decision is effectively ‘judicial legislation, but [is] justified since Parliament has given no guidance in the matter and in the past has apparently been content to leave the matter to judges,’ JC Smith, ‘Anti social behaviour order: whether proceedings civil or criminal in nature’ (2003) 4 Crim LR 269, 270.

<sup>47</sup> One commentator argued that the court, in its ‘sympathy to the legislative aims of the government, [...] paid insufficient attention to the serious punitive impact of the order upon the defendants,’ and failed to exercise their duty to interpret and enforce the ECHR, according to the Human Rights Act 1998, Pearson (n 39), 140-1; this lack of questioning could arguably emphasise the possibility that ‘the government has crossed the boundary from avoidance to evasion of its responsibility to uphold human rights,’ Ashworth, ‘Social Control and ASB’ (n 39), 290.

<sup>48</sup> *McCann* (n 16), [85] (Lord Hutton).

<sup>49</sup> *ibid*, [1] (Lord Steyn).

<sup>50</sup> *ibid*, [42] and [44] (Lord Hope of Craighead).

<sup>51</sup> *McCann* (n 16), [18] (Lord Steyn).

The nature of the 'social problem' in question, which was described by both Lord Steyn and Lord Hutton, will be discussed in more detail in the last section of this chapter. For now, it is important to note that the legislative vision of ASBOs as dual, or rather, hybrid orders was clearly acknowledged by the House of Lords, both as a question of form and substance.

In summary, the legislative provisions and the interpretation by the courts of the orders define ASBOs clearly as dual-faceted orders, combining civil and criminal elements to impose liability for anti-social behaviour. Although academic commentators have attempted to present ASBOs as either civil or criminal, the next section will show that the orders cannot be 'fitted' in a civil or a criminal template without disregarding their true nature.

## **II. Dual Legal Instruments and the Criminal/Civil Distinction**

As has been explained, ASBOs represent a mixture of civil and criminal law, creating a hybrid legal instrument which is neither fully civil nor fully criminal. This section will explore the distinction between civil and criminal law in the context of these instruments, and will argue that to characterise the relationship between civil and criminal law as a rigid dichotomy does not provide a workable framework to understand hybrid measures such as ASBOs. The purposive mix of civil and criminal elements in hybrid legal instruments further blurs an already complex distinction between civil and criminal law, which is often represented as either functional or procedural. In this context, the distinction represents less of a dichotomy and is better characterised as a continuum stretching between civil and criminal law, and in which hybrid legal instruments and ASBOs can find their place.

## **A. The Civil/Criminal Distinction: Two Interpretations**

Although the use of civil and criminal law as distinct legal instruments is recognised in many legal systems, the nature of that distinction has long proved elusive and contentious.<sup>52</sup> In some ways, it ‘has never been static,’<sup>53</sup> and legal developments have blurred the two, contributing to the debate over the existence of a rigid dichotomy.

The following sections present the two main interpretations of this distinction, based on a functional or procedural analysis. The aim is not to provide an exhaustive account of different approaches, but to present traditional understandings of the distinction. They will act as a guide to consider the overlap occurring in hybrid legal instruments, and help to highlight its failure to adequately reflect the reality of hybrid legal measures such as ASBOs.

### **1. Functional distinction**

The distinction between civil and criminal law can be traced back to ancient Roman law,<sup>54</sup> and is also present in early common law, where it distinguished between different types of actions, under the principle that ‘all pleas are either criminal or civil.’<sup>55</sup> Wrongs were recognised within the common law as tortious (e.g. breach of an agreement) or felonious (e.g. homicide, rape, etc) and the law distinguished between actions which involved private parties and those involving the Crown. However, the essential distinction resided in the function of each type of law. For any given wrong, two actions could generally be brought, one civil and one criminal, each fulfilling a

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<sup>52</sup> For an extensive list, see Paul H Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert’ (1996) 76 Boston ULRev 201.

<sup>53</sup> Carol Steiker, ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1996-97) 85 Geo LJ 775, 782.

<sup>54</sup> David J Seipp, ‘The Distinction between Crime and Tort in the Early Common Law’ (1996) 76 Boston ULRev 59, 59; and Markus Dubber, ‘Criminal Law Between Public and Private Law’ (July 17, 2009) <<http://ssrn.com/abstract=1499538> or <http://dx.doi.org/10.2139/ssrn.1499538>> present a more detailed discussion of the early origins of civil and criminal law.

<sup>55</sup> Civil pleas included claims for land and services for land, claims that agreements were not carried out, claims of free or villain status and claims for debt, while criminal pleas included treason, homicide, robbery, rape and breach of the king’s peace, Seipp (n 54), 80.



different function. Although simplified, this interpretation in early common law points to civil and criminal law differing by function, and defined by the sanctions they impose.<sup>56</sup> The civil action was designed to provide compensation to a wronged party through imposing damages and other remedies, whereas the principal function of the criminal law was to punish the wrongdoer, generally by imposing either a fine (which will be paid to the Crown or the state rather than the victim) or imprisonment.<sup>57</sup>

Blackstone also recognised the functional distinction between civil and criminal law in his *Commentaries*, which distinguished between compensation for civil wrongs and punishment for crimes.<sup>58</sup> More recently, this has been interpreted as the expression of a more abstract distinction between the two systems, based on the need to 'price' or 'prohibit' behaviour.<sup>59</sup> According to this analysis, the civil law is ultimately concerned with 'pricing' behaviour rather than straight out 'prohibiting' it: criminal law 'should be reserved to prohibiting conduct that society believes lacks any social utility, while civil penalties should be used to deter (or 'price') many forms of misbehaviour where the regulated activity has positive social utility but is imposing externalities on others.'<sup>60</sup>

The functional distinction therefore sees the civil and criminal law as fulfilling two separate purposes, a difference inherent in the outcomes of the corresponding action attached to each system of liability.

## **2. Procedural distinction**

Another account of the distinction between civil and criminal law focuses on the different procedure used in each system, and the procedural safeguards and requirements that distinguish criminal liability from civil liability. These are seen most clearly through the unique procedural safeguards encoded in criminal law.

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<sup>56</sup> For details on the available actions and a more complete account of the civil criminal distinction in early common law, see Seipp (n 54) and Dubber (n 54).

<sup>57</sup> The aim of the criminal law is also to deter individuals from committing criminal actions, but this is generally achieved by the threat of punishment. This is an overly simplified version of the functional distinction between civil and criminal, designed to identify its essence rather than its practical reality, and highlight the dichotomy on which it relies.

<sup>58</sup> BI Comm, as quoted in Steiker (n 53).

<sup>59</sup> Robert Cooter, 'Prices and Sanctions' (1984) 84 Colum LRev 1523, quoted in John C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models – and What Can Be Done About It' (1992) 101 (8) Yale LJ 1875, 1876.

<sup>60</sup> *ibid.*

The existence of a normative link between procedure and the nature of the criminal law can be traced back to Glanville Williams' circular definition of crime as 'an act capable of being followed by criminal proceedings having a criminal outcome.'<sup>61</sup> Procedural safeguards in the criminal trial have a normative significance in upholding the fairness of the criminal law, by ensuring that convictions and punishment are fair and justifiable, provided the appropriate procedural safeguards are in place.<sup>62</sup> By extension, a state must accept the burden of observing those additional safeguards if it is to create a new criminal offence.<sup>63</sup>

These safeguards stem from the common law and now the ECHR, and relate to both the pre-trial and trial stages.<sup>64</sup> The latter is dealt with in article 6 which establishes the right to a fair trial in both civil and criminal proceeding in its first subsection, but goes on to specify particular safeguards in criminal proceedings, including the presumption of innocence,<sup>65</sup> followed by a list of minimum rights, including the right to detailed information about the nature and cause of the accusation, the right to legal assistance, and the right to conduct a cross-examination of witnesses.<sup>66</sup> Additional safeguards exist related to these principles, such as the distinct burden of proof, which is 'beyond reasonable doubt' in criminal cases while civil claims have to be proved 'on the balance of probabilities.'

In total, these provisions, absent from the civil law, delineate criminal law from civil procedure on more than simply practical grounds. They are a reflection of the normative aims of criminal law, and deepen the significance of the procedural line drawn between the two, bringing it closer in line with the functional distinction. In fact, it is generally a combination of functional and procedural factors that can help distinguish between civil and criminal law. This combination will inform how civil and criminal elements interact in hybrid legal instruments, as will be discussed in the following section.

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<sup>61</sup> Glanville Williams, 'The Definition of a Crime' (1955) 8 (1) CLP 107, 107.

<sup>62</sup> Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 Crim L and Philosophy 22.

<sup>63</sup> Andrew Asworth and Mike Redmayne, *The Criminal Process* (OUP 2010), 404.

<sup>64</sup> Article 5 establishes specific rights in the event of an arrest.

<sup>65</sup> European Convention of Human Rights (ECHR), art 6(2).

<sup>66</sup> ECHR, art 6(2)(a), (c), and (d).

## **B. Hybrid Measures and the Civil/Criminal Classification**

Procedural and functional distinctions between civil and criminal liability are generally used to make sense of the existence of two systems of liability by establishing separate categories in which to fit specific legal instruments. Lawyers, judges and academics rely on these distinctions to categorise a measure as one or the other, assigning different consequences and possible safeguards when imposing liability.

In *McCann*, the appellant's argument focused precisely on the idea that a legal measure such as the ASBO could and should be categorised as either criminal or civil and, in this case, as only criminal. It was argued that although the procedure pointed to the orders being civil, the true function of the measure trumped this categorisation and made the orders criminal by nature.<sup>67</sup> The House of Lords rejected this simple distinction, reaffirming the civil nature of the orders' initial injunction while also further recognising their more complex overall nature by imposing a heightened burden of proof at the injunction stage, because of the possible criminal consequences.

This decision highlights the inadequacy of the civil/criminal distinction when faced with hybrid measures such as ASBOs. Although civil and criminal law do exist in practice as different systems of imposing liability, this distinction does not create clear or useful categories when looking at hybrid legal measures.

The following section will use ASBOs, along with two other examples, to illustrate how civil and criminal elements can be combined to create unique hybrid legal instruments which defy a rigid categorisation as civil or criminal. The existence of those other examples also suggests that the hybrid nature of ASBOs is not in fact a simple accident of legislation, but represents a purposive mixture of civil and criminal elements.

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<sup>67</sup> This argument was used in *Steel v UK* (n 38), which found that the power of binding over a person to keep the peace involved the determination of a criminal charge for the purposes of article 6, despite its civil denomination.

## **1. Two examples of hybrid legal instruments: civil contempt and public nuisance injunctions**

Before the ASBO was conceived, other legal instruments that mixed civil and criminal law were developed by the courts and Parliament. Civil contempt and public nuisance injunctions in particular provide striking examples of how civil and criminal law can be mixed to achieve a particular practical result when holding individuals liable for their behaviour. In civil contempt, criminal law is used in aid of the civil law by providing added 'teeth' to an existing injunction. By contrast, public nuisance injunctions use the injunctive power of the civil law to enforce a specific criminal offence.

### ***a) Civil contempt***

The offence of civil contempt<sup>68</sup> involves the disobedience or non-observance of a judgment, court order or other process of the court, and a private injury.<sup>69</sup> It was developed by the Court of Chancery in the 17<sup>th</sup> and 18<sup>th</sup> centuries as an extension of the offence of 'criminal' contempt. It enabled the Court to compel performance of obligation as between parties, and to order the indefinite imprisonment of the responsible party until he fulfilled his obligation.

Initially, imprisonment was a means of coercion and remedy, tempered by the principle of *ex debito justitiae*, and did not have a purely punitive purpose.<sup>70</sup> This

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<sup>68</sup> Civil contempt is related to but distinct from the better known offence of criminal contempt, which is often referred to as 'contempt of court', although the latter includes both instances. For a detailed account of contempt of court in general, see CJ Miller, *Contempt of Court*, (OUP 2000).

<sup>69</sup> Although the distinction between civil and criminal contempt has been questioned (its abolition was even suggested by the Phillimore Committee in 1981, before the Contempt of Court Act 1981), it still holds certain relevance in practice: in particular in relation to the role of the Crown, the unavailability of a writ of sequestration and certain privilege against arrest in civil contempt; Salmon LJ in *Jennison v Baker* describes the distinction as 'unhelpful and almost meaningless,' [1972] 2 QB 52, 61; as reported in 'Contempt of the N.I.R.C.' (1974) 37 (2) MLR 187 (Notes of Cases).

<sup>70</sup> The principle held that the contemnor would be released as soon as the order was performed, according to the adage that contemnors 'carry the keys to their prison in their own pockets,' which can be traced back to US case law in the beginning of the twentieth century, although it is a somewhat trite description of the sanction in reality: Phillip A Hostak, 'Note, International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt' (1995) 81 Cornell LRev 181, 184 and in reference to the case of *Maria Annie Davies*, 21 QBd 236, in which the defendant was imprisoned for 18 months because of refusal to obey an order (see James Francis Oswald, *Contempt*

established the appreciation of the contempt as specifically civil rather than criminal in nature.<sup>71</sup> The evolution of the case law, however, shows that the distinction between civil wrong and criminal offence is perhaps not so clear. In fact, civil contempt has been held to embody both a sanction for the disobedience of a court order or undertaking, and an act which threatens the administration of justice and so requires punishment.

Recent case law is still conflicted over the nature of the process, and the legislative reform of contempt has led to the disuse of the *ex debito justitiae* principle, establishing instead the need for a fixed term of imprisonment and granting judges the power to release a contemnor if they observe the terms of the injunction.<sup>72</sup> Imprisonment is now recognised as a powerful criminal law tool, not simply a means to enforce a civil obligation,<sup>73</sup> and represents a form of punishment and censure commensurate to the contemnor's level of guilt and remorse (or lack thereof).<sup>74</sup> The courts have also allowed the use of imprisonment or a fine even where the order had been complied with, or where the original complainant no longer had an interest in the obligation being observed.<sup>75</sup>

These decisions have emphasised the two-fold character of civil contempt, the value of which lies precisely in the combination of the deterrent effect of a flexible injunction and the liability for imprisonment for its breach.<sup>76</sup> In addition to coercing a party into observing an injunction, criminal law can be used when an individual is deliberately defying the court's authority.<sup>77</sup>

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*of court, committal, and attachment and arrest upon civil process in the Supreme Court of Judicature* (William Clowes and Sons 1895).

<sup>71</sup> As Lord Atkinson emphasised in *Scott v Scott* [1913] AC 417, a civil contemnor was 'not guilty of any crime whatever, but only of a civil contempt of court.'

<sup>72</sup> Contempt of Court Act 1981, s 14.

<sup>73</sup> 'it is now clearly established that a fine or committal order [- ie a custodial sentence -] may be imposed as punishment for past disobedience even though the contemnor has by then complied with the original order or undertaking.' Miller (n 69), para 2.03.

<sup>74</sup> 'the term of imprisonment which is imposed in any given case will vary according to the circumstances, including the consequences flowing from the breach, the degree of repetition, and the obduracy or, as the case may be, contriteness of the contemnor,' *ibid*, para 14.119.

<sup>75</sup> *Steiner Products Ltd v Willy Steiner Ltd* [1966] 2 All ER 387.

<sup>76</sup> *Jennison v Baker* (n 70), 65.

<sup>77</sup> In such cases, it has been observed that, 'notwithstanding that the order has now been complied with, it may well be that a punishment ought to be inflicted on them,' *Phonographic Performance Ltd. v. Amusement Caterers (Peckham) Ltd* [1964] Ch. 195, 199 (Cross J).

Civil contempt can thus be seen as the expression of a dual purpose: whilst the initial civil injunction creates a legal obligation for an individual, based on existing legal rights, the criminal law and its threat of imprisonment is used to force the observation of the court order in the future, as well as to punish its non-observance. Through common law, the offence of civil contempt evolved to allow for the use of criminal law in support of a civil injunction, and created a mixture of the two systems to achieve an effective remedy.

### ***b) Public nuisance injunctions***

In the case of public nuisance injunctions, the combination of criminal and civil law arose through different circumstances. Nuisance was originally a tort at civil law, which was sanctioned by the Writ of Right as a remedy for dispossession of one's land. Over time, the targeted behaviour widened and came to include adverse interference with the land rather than solely outright dispossession, and was eventually applied to cases of similar interference with public land.<sup>78</sup>

This evolution helped link civil and criminal law in the development of the legal concept of public nuisance.<sup>79</sup> Although cases of common or 'public' nuisance were generally dealt with by the local criminal courts, individuals' claims for specific damages were eventually accepted by the civil courts, and although in the late 18<sup>th</sup> and early 19<sup>th</sup> century both means of enforcement were used in combination, by the end of the latter, civil actions had effectively overtaken prosecution.<sup>80</sup> Despite its qualification as a criminal offence, the use of the civil law therefore became necessary to prevent or at least limit the harmful effect of the nuisance rather than retrospectively punish the culprits. Civil injunctions provided a better remedy to the

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<sup>78</sup> This included the obstruction of a right of way, or the carrying out of a noisome trade; John Spencer, 'Public Nuisance – A Critical Examination' (1989) 48 CLJ 55, 57.

<sup>79</sup> By the early 18<sup>th</sup> century, public nuisance was defined as capable of being committed 'either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires,' William Hawkins, *Pleas of the Crown* (2<sup>nd</sup> edn 1724), 197.

<sup>80</sup> Civil actions represented the 'usual means of dealing with [...] public nuisance' whereas 'prosecutions were [...] used mainly to deal with one-off pieces of misbehaviour,' Spencer (n 79), 71; Spencer attributes this change in large parts to the industrial revolution and development of mass pollution, where the prosecution of corporations were particularly difficult in cases of public nuisance, leading to an increased reliance on civil injunctions, *ibid* 70-71.

specific problem arising from the criminal behaviour, creating a mixture of civil and criminal law to tackle the issue.

The use of this mixture of civil and criminal law was further expanded in 1972, where local authorities were given the right to seek public nuisance injunctions, without the need for prior permission, for the suppression of public nuisances but also well as for the restraint of breaches of the criminal law.<sup>81</sup> While the latter merely confirms the existing use as detailed above, the former essentially gives local authorities a right to invoke the assistance of the civil law in aid of the criminal law whenever it may seem necessary.<sup>82</sup> Although the wrongful nature of the behaviour targeted justifies the creation of a general criminal offence, the interests of the parties concerned call for the imposition of a specific civil injunction, in the hope of stopping behaviour before it happens. Whereas civil contempt evolved to use the criminal law in aid of the civil law, public nuisance injunctions rely on the injunctive power of the civil law in aid of the criminal law.

## **2. Re-assessing the civil/criminal distinction: from rigid dichotomy to a flexible continuum**

Just as in ASBOs, civil contempt and public nuisance injunctions mix civil and criminal elements and create hybrid legal instruments to tackle individual responsibility. This deliberate mixture makes it difficult to classify them as either civil or criminal according to the rigid procedural or functional distinction, and all three examples exhibit a different combination of civil and criminal characteristics, procedurally and functionally. The characterisation of the civil/criminal distinction as a continuum rather than a rigid dichotomy provides a better framework within which to understand and place such examples.

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<sup>81</sup> Local Government Act 1972, s 222, the reform is discussed in *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [25].

<sup>82</sup> Despite the initial claim made by Lord Wilberforce in *Gouriet v UPOW* that this right was an 'exceptional power', [1978] AC 435, 481; the Court of Appeal held that can be exercised even when there is no actual proof that criminal penalties would be inadequate, *City of London Corp v Bovis Construction Ltd* [1992] 3 All ER 697.

***a) ASBOs, civil contempt, public nuisance injunctions and the civil/criminal classification: similarities and differences***

Despite their similarities, ASBOs, civil contempt and public nuisance injunctions each use a different mixture of civil and criminal elements, creating related but ultimately distinct measures to impose liability. This section will compare those functional and procedural differences.

As discussed, the procedure for civil contempt is largely criminal, but accommodates some concessions to the civil nature of the initial proceedings, while public nuisance injunctions are principally civil injunctions used as a remedy against criminal behaviour. Functionally, the purpose of both remedies is a reflection of the civil need for damages and coercion, combined with the criminal call for punishment. But despite being similar to ASBOs in their hybrid nature, civil contempt and public nuisance injunctions present different characteristics in practice.

In terms of process, the public nuisance injunction is different from civil contempt and ASBOs in that it does not specifically represent a dual process. Instead, it uses a civil injunction and civil procedure in support of what is considered a crime, enforceable through the use of civil contempt in case of a breach of the injunction. By contrast, in civil contempt, breach of the initial injunction can lead to criminal sanctions, bringing it closer to the way ASBOs operate in mixing the civil and the criminal law.

Still, there are important differences between civil contempt and ASBOs in relation to the granting of that initial injunction. Although the burden of proof for a finding of civil contempt has been raised to the criminal level of 'beyond reasonable doubt', the initial injunction remains fully civil and the wrong need only be proved according to the civil burden of the balance of probabilities. ASBOs, however, now require the proof of the 'anti-social behaviour' to the criminal standard of proof, as decided by the House of Lords in *McCann*.<sup>83</sup> The fact that only parties to the initial injunction can bring proceedings for civil contempt also distinguishes the measure from ASBOs, which are

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<sup>83</sup> See above the discussion of the decision at n 16 and ch 3, text to n 4.



applied for by local and police authorities, and where the breach of an order will be prosecuted by the CPS, rather than any wronged party.<sup>84</sup>

Functionally, ASBOs and civil contempt present a number of differences as well. In the case of civil contempt, the function is to coerce the defendant into respecting the pre-decided obligation, but also to punish him or her for disrespecting the authority of the civil law. The criminal element of punishment attached to the offence is not linked specifically to the injunction itself, but rather to the effect of not following the injunction, which causes a public wrong against the administration of justice. This sets civil contempt apart from public nuisance injunctions and ASBOs, where, at least in theory, the criminal function of punishment is attached to the initial behaviour and its impact on others.<sup>85</sup>

ASBOs and public nuisance injunctions have important similarities from a functional perspective. Their purpose, ultimately, is to prohibit behaviour, and to provide a means of punishment if the prohibition is not observed. This similarity was recognised by the Court of Appeal when, in a recent case, it identified both ASBOs and injunctions as possible tools for local authorities to use when fulfilling its duty to formulate and implement a strategy against such behaviour.<sup>86</sup> Both instruments are premised on ‘circumstances in which it is appropriate for local authorities [and judges] to use the civil law in order to control the activities of those who create disturbances.’<sup>87</sup> This ability to use the civil law ‘in aid of the criminal law’<sup>88</sup> is also reflected in ASBOs’ reliance on an initial civil injunction and demonstrates the functional parallels between the two measures.

Yet despite these commonalities, key differences remain between the measures from a procedural perspective. Public nuisance injunctions were developed to target behaviour amounting to a specific criminal offence, and although the relator action was extended to cover other types of behaviour, it is still only available to target behaviour which is criminal, but cannot adequately be dealt with by the criminal law.

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<sup>84</sup> CDA 1998, s 1(10).

<sup>85</sup> The way the orders have been applied in practice is discussed more fully and critically in ch 5, ss IA2 and IB2.

<sup>86</sup> CDA 1998 ss 6(1) and 17 impose a duty for local authorities and police forces to devise a strategy to target anti-social behaviour, see ch 2 (n 90).

<sup>87</sup> *Shafi* (n 82), [26].

<sup>88</sup> *Stoke on Trent City Council v B&Q Retail Ltd* [1984] 1 A.C. 754, 776 A-F.

ASBOs, on the other hand, aim to tackle a specific type of ‘anti-social behaviour’, which can include a large number of situations.<sup>89</sup> Whilst the behaviour in question will sometimes amount to a criminal offence, this is not a prerequisite for the imposition of an order, as it is in public nuisance injunctions. Furthermore, once an injunction has been imposed, failure to observe its terms will be treated as a civil contempt of court and prosecuted as such, a process which is different from that of ASBOs. The process through which the injunction is enforced therefore also sets it apart from ASBOs from a procedural perspective.

Two conclusions can be drawn from this comparative exercise. The existence of the examples set forth shows that ASBOs and the mixture of civil and criminal law they exhibit are not a freak occurrence which emerged solely from the inventive mind of New Labour law-makers.<sup>90</sup> In fact, through a combination of judicial and statutory law-making, the offence of civil contempt and public nuisance injunctions have both evolved to represent a similar mixture of civil and criminal law, intentionally drawn together to achieve a particular legal result.

Further, civil contempt and public nuisance injunctions, whilst sharing some attributes with ASBOs, mix civil and criminal law in unique ways, combining procedural and functional elements from the two systems to achieve different results. In the case of civil contempt, the criminal law is used to complement and uphold the obligations of the civil law, while public nuisance injunctions are the result of the civil law coming to the rescue of the untimely criminal law. With ASBOs the interaction seems to operate in both ways, each system meant to palliate the lacunae of the other: using the civil law permits the admission of hearsay evidence and specific terms to control individual behaviour, while the threat of criminal punishment signifies the seriousness of the offence and deters individuals from breaching the terms of their order.<sup>91</sup>

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<sup>89</sup> The specificity of the concept of ‘anti-social behaviour’ is put into question by the lack of a clear definition included in the legislation, as was presented in the first section of this chapter and as will be discussed in further chapters. The point however remains, that the orders are intended to target a particular type of behaviour.

<sup>90</sup> For a discussion of the political background to the orders, see chapter 2.

<sup>91</sup> For a more detailed analysis of the orders, see chapters 2 and 3.

### ***b) Beyond the dichotomy***

Hybrid legal measures have often been portrayed as proof of a significant degree of overlap between civil and criminal law in practice, leading to complexity, even confusion<sup>92</sup> and leading some to call for the abolition of the distinction entirely.<sup>93</sup> The examples presented above suggest a counterpoint: that the overlap in question is not a product of confusion, but a reflection of intelligent legal design. In this context, a rigid philosophical distinction between civil and criminal law is insufficient for mixed measures which do not fit squarely in either category.

The functional and the procedural distinction between the two categories fails to take account of the existence of hybrid instruments, including ASBOs. Indeed, the existence of these hybrid instruments may suggest an alternate approach to the attempt at classification, wherein the distinction between criminal and civil law can be understood not as a binary division, but as forming distinct points on a continuum of measures to control individual behaviour. These measures range from the fully civil to the fully criminal, and the combined nature of legal instruments such as civil contempt or public nuisance injunctions places them somewhere in between those two extremes.

This does not mean that there is no meaningful distinction to be drawn, or that the two systems should be merged as one system of liability.<sup>94</sup> In fact, the overlap between civil and criminal law can be seen as a function of the way they operate alongside each other. However, the line between the two systems cannot be precisely delineated, in the same way that two colours can blend into each other without a clear point where one colour changes to the other. Although legal instruments can often be distinguished on the basis of either—or both—procedure and function, the combination of civil and criminal elements can add a more complex layer to their legal nature. As a result, in hybrid instruments such as ASBOs civil and criminal elements are not merely juxtaposed or set against each other, but can be used in combination to

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<sup>92</sup> Steiker (n 53), 775.

<sup>93</sup> Although the case for a procedural distinction has been questioned, for example see Issi Rosen-Zvi and Talia Fisher, 'Overcoming Procedural Boundaries' (2008) 94 (1) Va LRev 79.

<sup>94</sup> The complex and overlapping nature of the civil / criminal distinction has led some to argue it has become irrelevant or that the overlap between the two has become so important that it has reconfigured the civil and criminal law as an overarching system of sanctioning measures, rather than distinct legal systems; Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 Boston ULRev 1 and Rosen-Zvi and Fisher (n 94).

achieve a particular result. The next section will explore how this combination is illustrated in the example of ASBOs.

### **III. Making Sense of ASBOs' Dual Nature: Academic Perspectives**

#### **A. ASBOs and the Civil/Criminal Distinction**

Academic critique of ASBOs has been largely informed by the traditional vision of the civil/criminal distinction and has on the whole been negative. The criticism has principally stemmed from a dichotomised approach, with most seeing ASBOs either as a civil or criminal legal entity. Some academics argue the orders have been assimilated into proceedings for civil contempt. But the predominant view has focused on the criminal nature of the orders. Much criticism dismisses the civil element of the orders as subterfuge to bypass procedural safeguards for the imposition of criminal liability or to streamline enforcement in order to increase the sentence for low-level criminal behaviour. Both approaches exaggerate the civil/criminal distinction and misrepresent the dual nature of the orders.

##### **1. ASBOs as civil by nature: the contempt analysis**

In an attempt to present an alternative understanding of ASBOs, Hoffman and MacDonald have argued that they should be reinterpreted simply as a specialised instance of civil contempt. This rests on a perception of ASBOs as 'traditional' civil orders which would be subject to the procedure of civil contempt for breach. In this vision, the criminal offence created by section 1(10) of the CDA is therefore deemed redundant and would be replaced by the offence of 'contempt of court' according to the common law offence of civil contempt.<sup>95</sup> This relabeling, according to Hoffman and McDonald, would have practical and procedural advantages, as well as maintain or at

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<sup>95</sup> Simon Hoffman and Stuart Macdonald, 'Should ASBOs Be Civilized' [2010] Crim LR 457, 461.

least clarify the distinction between civil and criminal law, which they accuse ASBOs of blurring.

The practical advantages of converting ASBOs into civil contempt are presented as threefold:

1. The newly devised orders would be applied for only by local authorities (and not police, although they would be involved through the CDRPs), and decided by county courts rather than magistrates' courts.<sup>96</sup> According to Hoffmann and McDonald, this would be beneficial because of the respective attitudes and expertise of judges on those courts, and would also rely on local authorities' holistic approach when dealing with anti-social behaviour.
2. Secondly, the burden of proof of the application would revert to the civil standard of 'on the balance of probability', giving the court more flexibility in considering evidence, and in particular hearsay evidence.<sup>97</sup> Courts would also be given greater flexibility in sentencing the breach of an order, including the possibility of a 'conditional discharge', not available in breach of an ASBO.<sup>98</sup>
3. Finally, the breach of an order would not be prosecuted by the CPS, but would rely on the local authority who applied for the order in the first place to bring an action. This is seen by the authors as an advantage over the reported CPS policy not to treat anti-social behaviour as a minor offence.<sup>99</sup> If the behaviour was dealt with through civil contempt, Hoffman and McDonald argue, the local authority could take into account the wider context of the behaviour in question and the consequences of a criminal conviction, avoiding prosecutions for routine or technical breaches of an order.<sup>100</sup>

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<sup>96</sup> See above, text to n 16.

<sup>97</sup> *ibid.*

<sup>98</sup> CDA 1998 s 1(11) states that it 'shall not be open to the court by or before which he is so convicted to make an order under subsection (1)(b) (conditional discharge) of [section 12 of the Powers of Criminal Courts (Sentencing) Act 2000] in respect of the offence' under s 1(10).

<sup>99</sup> Hoffmann and MacDonald (n 96), 467-8; the wording of CPS policy on anti-social behaviour orders has since changed, see <[http://www.cps.gov.uk/legal/a\\_to\\_c/anti\\_social\\_behaviour\\_guidance/](http://www.cps.gov.uk/legal/a_to_c/anti_social_behaviour_guidance/)> (last accessed 6<sup>th</sup> December 2014).

<sup>100</sup> Hoffmann and MacDonald (n 96), 467-8.

From a procedural and practical perspective, the parallels may be appealing, but the actual advantages are arguably limited and reliant on the way relevant authorities would apply the orders, rather than effecting a real substantive change.<sup>101</sup> While the idea of adapting ASBOs to become wholly civil measures might indeed seem to ‘render the measure less obnoxious,’ it is based on a number of assumptions designed to remedy what is seen as the unsatisfactory nature of the orders by its critics.<sup>102</sup>

In particular, it relies on an overstatement of the substantive advantage of the orders’ requalification. The benefit attributed to the classification of ‘civil contempt’ as drawing a clearer line between civil and criminal law relies on the existence of such a line between the two. The complex nature of civil contempt, as presented earlier, suggests that any clarification drawn from the requalification of ASBOs as civil contempt would remain relative.<sup>103</sup>

More importantly, however, this attempt to fit ASBOs into the civil contempt ‘box’ misrepresents ‘the substantive content of the criminal offence of breaching an ASBO.’<sup>104</sup> As presented in the first section of this chapter, the criminal element is seen by both Parliament and the House of Lords as a key characteristic of the orders. Civil contempt may superficially resemble the process of ASBOs, but the imposition of punishment in case of breach of the initial injunction is not the same in each instance. Punishment for civil contempt relates to the disrespect of the institution of justice and is only indirectly related to the details of the initial injunction, whereas the offence of breaching an ASBO is directly attached to the behaviour that led to the initial injunction. Irrespective of the extent to which a requalification of the orders as civil contempt would in fact achieve a ‘civilization’ of ASBOs, the initial impetus for this reasoning ignores the functional differences between the two measures. As this thesis

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<sup>101</sup> The practical relevance of adding flexibility to the courts’ handling of ASBOs and of increasing the role of local authorities in relation to the orders can be called into question considering the level of flexibility written into the legal provisions defining the orders, and the important role already played by local authorities in the application for and granting of ASBOs: according to Home Office figures, of the 9,651 orders granted on application between 1998 and 2013, 64.5% were applied for by local authorities, and around 28% applied for by the police, who will often be working in partnership with local authorities in the first place; Home Office statistics (n 11).

<sup>102</sup> Peter Ramsay, ‘Substantively Uncivilized Asbos’ (2010) 10 CrimLR 761, 763.

<sup>103</sup> In particular, the use of custodial sentences are now acknowledged to represent criminal censure rather than solely coercive pressure, see above n 75.

<sup>104</sup> Ramsay (n 114), 761.

will argue, the conceptual strength of ASBOs resides in their own particular mix of civil and criminal law, which existing proceedings for civil contempt cannot achieve.

## **2. ASBOs as essentially criminal: ‘backdoor criminalisation’ and streamlined enforcement.**

Another classification of ASBOs sees them as essentially criminal, generally taking a dismissive interpretation of the civil element. As a result, this approach portrays ASBOs’ dual nature principally as a means to criminalise behaviour which would not otherwise warrant criminal prosecution, or which would attract a lesser sanction if prosecuted.

### ***a) Backdoor criminalisation through procedure***

This vision of ASBOs as a route to criminalisation, with only little relevance attached to the civil injunction, can be traced back to the very genesis of the orders. Even prior to their legislation, in response to the articulation of ASBOs within policy documents, critical academic voices were heard against the introduction of these hybrid orders, taking issue with, amongst other things, the definition of the targeted behaviour, the low standards of evidence and proof and the disproportionate penalty imposed.<sup>105</sup> While the issue of ‘anti-social behaviour’ was generally acknowledged by critics as a ‘genuine one, particularly for those living in certain neighbourhoods,’ the question of how it ought to be tackled was identified as highly challenging, and the suggested orders were deemed ‘unacceptable.’<sup>106</sup>

The principal argument in favour of the criminal requalification of ASBOs relied on a ‘two-step prohibition’ (TSP) analysis, as proposed in particular by Andreas von Hirsch and A.P. Simester. This perspective focused on the procedural use of the civil law in the orders, seen merely as a preliminary stage to the commission of a criminal offence and

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<sup>105</sup> A series of articles was published in the wake of New Labour’s plans for the ASBO, outlined in the run up to the 1997 elections; Andreas von Hirsch and others, ‘Overtaking on the Right’ [1995] *NLJ* 1501; Andrew Ashworth and others, ‘Neighbouring on the Oppressive’ (1998) 16 (1) *Criminal Justice* 7, Andrew Ashworth and others, ‘Clause 1: The Hybrid Law from Hell?’ (1998) 31 *CJM* 25.

<sup>106</sup> Andrew Ashworth, ‘In Favour of Community Safety (Editorial)’ (1997) 11 *Crim LR* 769, 769.

the imposition of a severe sentence. This vision of ASBOs represented their dual nature as a way to bypass procedural safeguards imposed by the criminal law and criminalise behaviour which would not otherwise be criminal. It was based on their being mapped out chronologically and operating on a three-incident timeline:

- t0: qualifying behaviour by D occurs;
- t1: TSP Order issued (predicated on proof of D's behaviour at t0, but forward-looking);
- t2: conduct by D occurs in contravention of the TSP, leading to criminal prosecution for violation of the order (predicated on proof of conduct at t2).<sup>107</sup>

These three events are linked by two legal steps: a civil order at t1, based on anti-social behaviour at t0, and a criminal prosecution and potential conviction at t2 upon breach of the order. While the authors admit that the order at t1 'is not intrinsically a criminal process or disposal,' they see it as a form of '*criminalisation*: an *ex ante* criminal prohibition, not an *ex post* criminal verdict.'<sup>108</sup> The orders are therefore represented as little more than a bridge between the behaviour at t0 and the criminal offence at t2, allowing for the criminalisation of a particular behaviour. And while not technically criminal in nature, the authors hold that ASBOs should still 'be subject to constitutional and other rule of law constraints that govern the legitimate criminal prohibition of behaviour by citizens.'<sup>109</sup> These constraints range from the obligation to observe a fair trial to that of generality, but also include the issues of culpability and proportionality, as well as fair warning.<sup>110</sup> ASBOs are found wanting in each category, according to this analysis. In the eyes of von Hirsch and Simester, the use of civil law at t1 in the context of the initial injunction allows for these safeguards to be bypassed, despite the ultimate criminal nature of the offence at t2, and leads to the improper criminalisation of behaviour.

Despite the recognised ambivalent nature of the ASBOs, this analysis of the orders' purpose focuses almost exclusively on their eventual criminal outcome. It is true that

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<sup>107</sup> A P Simester and Andreas von Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in A P Simester and Andreas von Hirsch (eds), *Incivilities: Regulating Offensive Behaviour* (Hart 2005), 175.

<sup>108</sup> Simester and von Hirsch, 'Regulating Offensive Conduct' (n 108), 178.

<sup>109</sup> *ibid*, 179.

<sup>110</sup> *ibid*, 179 – 189.



ASBOs would, by nature, create situations where behaviour which would otherwise not be a crime might lead to the commission of a criminal offence. For instance, if an order is granted against a graffiti artist ordering him not to carry a can of paint, that specific action (i.e. carrying a can of paint) will effectively become a criminal offence for that particular individual.

However, as this thesis suggests, the dual nature of ASBOs represents more than a mere procedural mechanism and speaks to the type of relationship the orders seek to regulate. In an attempt to protect specific communities, it is designed to target behaviour which is not necessarily criminal in the traditional sense, but harms or creates a risk of harm to a community. In the case of the graffiti artist, while it would be unjustified to criminalise the carrying of a can of paint in general, ASBOs operate on the premise that it can be justified in specific circumstances and for specific individuals. By categorizing the orders as essentially criminal, this analysis fails to recognise this function of their dual nature, as advocated by Parliament and acknowledged and validated by the House of Lords in *McCann*.<sup>111</sup>

### ***b) ASBOs as an enforcement mechanism***

Other interpretations of the orders as essentially criminal in nature also use a procedural analysis, but focus on what is seen as their ultimate function as ‘quasi-criminal enforcement mechanisms.’<sup>112</sup> Here, as in the above analysis of the orders, the initial civil stage of the process is considered a simpler route towards criminalisation. However, this analysis focuses on the criminalisation of behaviour which would already be criminal under traditional criminal liability, although it may be more difficult to prosecute or attract a lower sentence on conviction. ASBOs are thus seen as a means to simplify the criminalisation process and render it more severe.

This vision of the orders is encapsulated in the claim that the most convincing justification for ASBOs is that upon breach the ASBO ‘provides a mechanism for the imposition of a composite sentence ... which reflects the aggregate impact of the

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<sup>111</sup> See above, text to n 16, and ch 2 on the political background to the orders.

<sup>112</sup> Peter Squires, *Asbo Nation: The Criminalisation of Nuisance* (Bristol: The Policy Press, 2008), p.4.

individual's conduct',<sup>113</sup> rather than the seriousness of a single act.<sup>114</sup> This relies principally on the political account of the behaviour initially targeted by the orders, as put forward by the government when ASBOs were created. In particular, it refers to 'individuals who have continually committed criminal acts of a certain level of seriousness in a particular area, making the lives of those living there unbearable.'<sup>115</sup>

In this context, the dual civil and criminal operation of ASBOs is seen purely as a way to impose an increased sentence for the aggregate of behaviour which cannot adequately be dealt with by the civil or criminal law alone. It addresses both the issue of evidence availability and intimidated witnesses, as well as the challenges of using criminal law to deal with long running and low level criminal behaviour.<sup>116</sup> According to this interpretation, the fact that the sentence for breach of the ASBO is linked to previous criminal behaviour is the only possible justification for 'a *criminal* sentence of such *severity*.'<sup>117</sup> But the criminal acts that justify the eventual sentence have only been demonstrated in a procedure that satisfies civil, but not all criminal, standards of procedure.

Some examples of the orders' application in practice have arguably lent support to this vision of the orders as a practical tool to increase or accelerate criminalisation. The combination of a relatively easy or streamlined procedure at the civil injunction stage with an automatic and relatively high criminal sentence upon breach has fuelled claims that the contemporary notion of anti-social behaviour is 'almost entirely enforcement driven and defined through the enforcement process.'<sup>118</sup>

The localised use of ASBOs to target women working as prostitutes is a striking example of how the orders can be used to achieve criminalisation with more serious consequences than would otherwise be warranted. In an effort to tackle prostitution in their area, the West Midlands Police and Birmingham City Council adopted a 'two-pronged approach' against women working as prostitutes: the former being ASBOs,

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<sup>113</sup> Stuart Macdonald, 'The Principle of Composite Sentencing: Its Centrality to, and Implications for, the Asbo' (2006) 9 Crim LR 791, 801.

<sup>114</sup> *ibid*, 792.

<sup>115</sup> *ibid*. referring to Labour Party, 'A Quiet Life' (n 10).

<sup>116</sup> MacDonal, 'The Principle of Composite Sentencing' (n 113), 792.

<sup>117</sup> *ibid*, 793 – italics in the original document.

<sup>118</sup> Peter Squires, 'New Labour and the Politics of Anti-Social Behaviour' (2006) 26 (1) Critical Social Policy 144, 159.

the latter being public nuisance injunctions.<sup>119</sup> Using ASBOs enabled the local authorities and the courts to effectively bypass Parliament's decision not to impose custodial sentences for prostitution, despite its criminal nature.<sup>120</sup> As such, the orders formed one key aspect of a specific enforcement strategy against a specific type of criminal behaviour.

Although practical examples suggest that ASBOs can be and have indeed sometimes been used as an enforcement tool to target criminal behaviour in a more efficient way, this does not prove that their intrinsic nature is criminal. The initial behaviour which can lead to the imposition of an order is the first aspect to consider. Anti-social behaviour is defined in the CDA as 'any behaviour likely to cause harassment, alarm or distress.'<sup>121</sup> This includes criminal behaviour, but can also include more benign behaviour such as playing music too loud or generally intimidating others.<sup>122</sup> In the case of *McCann*, for example, although there was some evidence or at least suggestion of criminal behaviour, not all the behaviour would have amounted to a crime.<sup>123</sup>

Policy development leading to the introduction of ASBOs focused on the notion of 'low-level criminal behaviour' as a shorthand for 'anti-social behaviour', but this is not reflected in the drafting of the CDA, or in the application of its provisions. Even political documents<sup>124</sup> outlining the concept of ASBOs and anti-social behaviour acknowledged that anti-social behaviour was not limited to criminal behaviour.<sup>125</sup> As a result, in many cases, the initial behaviour leading to an ASBO, and the breach of the ASBO itself, would not amount to a criminal offence if it weren't for the ASBO, and thus would fall

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<sup>119</sup> For more details on this approach, see Tracey Sagar, 'Public Nuisance Injunctions against on-Street Sex Workers?' (2008) 5 Crim LR 353, 354.

<sup>120</sup> Criminal Justice Act 1982, s 71 abolished the use of custodial sentences for soliciting offences; Helen Jones and Tracey Sagar 'Crime and Disorder Act 1998: prostitution and the anti-social behaviour order' (2001) 11 Crim LR 873, and Tracey Sagar, 'Tackling on-street sex work: Anti-social behaviour orders, sex workers and inclusive inter-agency initiatives' (2007) 7(2) Criminology and Criminal Justice 153; the use of ASBOs for prostitution is also discussed more critically in ch 5, s IIB2b.

<sup>121</sup> CDA 1998, s 1(1).

<sup>122</sup> The definition of anti-social behaviour is discussed in more details in chapters 2 and 3.

<sup>123</sup> See above, text to n 19.

<sup>124</sup> Labour Party 'A Quiet Life' (n 10) and Home Office, 'Respect and Responsibility – Taking a Stand against Anti-Social Behaviour' (Cm 5778, 2003).

<sup>125</sup> McDonald (n 113) dismisses this type of anti-social behaviour by stating that acts such as these would not normally justify early intervention and could generally be dealt with by community sentences.

outside any claim that past criminal behaviour justified the severity of any future sentence for breach of the orders.

In summary, although ASBOs' dual nature does raise the possibility of improper criminalisation, this is not a full reflection of their function as hybrid civil/criminal instrument. As this thesis argues, ASBOs seek to regulate a different kind of relationship—the relationship between an individual and a community— and in doing so, target behaviour because of the harm it causes to communities rather than individuals. Moreover, they do so for reasons which differ from traditional criminal law, whether the behaviour is otherwise criminal or not. The following section will explore how the type of behaviour targeted by ASBOs can be related to the protection of communities.

## **B. Another Vision of ASBOs: the Community Angle**

The placement of ASBOs on a continuum, somewhere between 'pure' civil and criminal liability, was a deliberate legislative policy, specifically designed to target behaviour incompletely covered by either system of liability alone. Policy material referred to the threat posed to local communities, and the House of Lords in *McCann* explicitly referred to the existence of an important social problem, balancing the rights of the 'community' against those of the individual being subjected to liability.<sup>126</sup> The very concept of anti-social behaviour and the construction of the orders put the emphasis on the way an individual interacts socially with others around him and how his behaviour causes harm to a specific and identifiable group of other individuals, rather than generally causing offense or violating pre-agreed norms of behaviour.

This thesis will argue that these social groups are best characterised by the concept of community, or a multitude of communities which exist within a broader nation or society. Neither the civil law, with its emphasis on regulating individual relationships, nor the criminal law, with its emphasis on regulating the relationship between the individual and society in general, is up to the particular task of regulating the

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<sup>126</sup> In particular 'A Quiet Life' (n 10) and Labour Party, 'Protecting Our Communities' (1996).

relationship between an individual and this type of community. Accepting that the distinction between civil and criminal exists as a continuum, and that ASBOs combine elements of both, does not by itself make clear the underlying social relationship which justifies the particular combination of civil and criminal law which constitutes an ASBO. The argument here is that the extreme ends of this continuum map onto two different kinds of social relationship. To understand what justifies the imposition of an ASBO, we have first to consider the social relationships which it seeks to protect, a relationship which is significantly different from that which can be attributed to either the civil or the criminal law and can be characterised as a community relationship.

## **1. ASBOs and the social problem of anti-social behaviour**

### ***a) The McCann decision***

As was presented in the first part of this chapter, and as will be discussed further in Chapter two, ASBOs' dual nature was designed to be used in a particular type of social situation. In practical terms, the use of a civil injunction has allowed the possibility of hearsay evidence and flexibility of procedure and in the terms it creates, whereas the criminal offence upon breach added teeth to the injunction and signified the severity with which the legislator intended ASBOs to be considered. This mix of civil and criminal law was aimed at a perceived problematic social situation: the admission of hearsay evidence was meant to benefit those affected by anti-social behaviour who might be intimidated by giving evidence, whereas the wide discretionary powers given to the courts would give them the jurisdiction to adapt the orders to particular situations and contexts, with regard to the criminal offence.

In its *McCann* decision, the House of Lords not only confirmed the dual nature of ASBOs, but also acknowledged the relational nature of the orders.<sup>127</sup> As Lord Steyn explicitly put it, the legislative technique used in the orders was directly aimed at resolving a particular 'social problem' which needed to be addressed, and regarding

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<sup>127</sup> Albeit in a slightly altered way, following the decision to impose a criminal standard of proof to the initial finding of anti-social behaviour (n 43).

which ‘there appeared to be a gap in the law.’<sup>128</sup> In all three judgments, the nature of the social problem or ‘disruption’<sup>129</sup> seemed to be directly associated with the type of behaviour that the two sets of facts comprised. In each case, the defendants had behaved in a threatening, aggressive and sometimes criminal manner in a particular neighbourhood. The body of evidence in each case included a wide range of sources, all pointing to the fact that the McCann brothers and Mr Clingham had negatively affected people living in their local area.

In their justification for preserving the orders’ dual nature, the Lords specifically referred to the notion of community as a counter-balancing weight when considering the rights of an individual defendant. The idea of community protection was made clear in Lord Hutton’s judgment, when he reaffirmed the importance, in the determination of ECHR rights, of balancing ‘between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.’<sup>130</sup> In the case of ASBOs, it was held that:

the striking of a fair balance between the demands of the general interest of the community (the community in this case being represented by weak and vulnerable people who claim that they are the victims of anti-social behaviour which violates their rights) and the requirements of the protection of the defendants’ rights requires the scales to come down in favour of the protection of the community...<sup>131</sup>

The construction of the community in question as ‘weak and vulnerable’ therefore seems to play an important role in the justification for ASBOs. This position was reflected in Lord Steyn’s statement of his ‘initial scepticism of an outcome which would deprive communities of *their* fundamental rights,’<sup>132</sup> again seemingly tilting the balance in the favour of protecting the communities in question.

This sets ASBOs apart from the relationships that are the object of traditional notions of criminal law and civil law. With the idea of community comes a more context-specific, or evaluative approach to determining the need for and conditions of an ASBO, based on the nature of the behaviour and the needs of those affected by

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<sup>128</sup> *McCann* (n 16) [15] (Lord Steyn).

<sup>129</sup> *Ibid*, [42] (Lord Hope).

<sup>130</sup> *Sporrong and Lönnroth v Sweden* 5 EHRR 35, 52, para 69, quoted in *McCann* (n 16) [113] (Lord Hutton).

<sup>131</sup> *McCann* (n 16) [113] (Lord Hutton).

<sup>132</sup> *Ibid*, [18], original emphasis.

it.<sup>133</sup> Balancing the interests of the community and the rights of the individual is hardly a nominal consideration: the fundamental aim of ASBOs is to give the courts the tools to consider those interests factually when making a decision.

When determining liability in ASBOs, achieving this balance is crucial as well. The imposition of an order is focused on the behaviour of a single individual, as opposed to a whole class of people deemed to be posing a risk to the safety of others.<sup>134</sup> This means the risk assessment exercise involved in the granting of an order necessarily implies evaluating 'the likely future behaviour of the particular defendant'<sup>135</sup> in a particular community context.

The legal definition of what constitutes anti-social behaviour also reinforces the relevance of the context in which it will occur. That the words 'harassment, alarm or distress'<sup>136</sup> are included in the CDA definition of anti-social behaviour suggests that the harmful nature of the behaviour will by definition be 'context-dependent' and will be measured by its effect on the community in question.<sup>137</sup> This focus on the impact on a particular group is reinforced by the high level of judicial discretion granted to the courts, and in particular when determining whether an order will be necessary according to section 1(1)(b), as was confirmed by House of Lords in *McCann*.<sup>138</sup> As such the orders' dual nature creates a legal instrument which attempts to 'regulate the attitudes and perceptions that constitute the continuing relationships between individual subjects,'<sup>139</sup> specifically within a particular community context.

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<sup>133</sup> The term evaluative was specifically used by Lord Steyn when discussing the necessity test under section 1(1) of the Act.

<sup>134</sup> This can be interpreted as a 'clinical' risk assessment exercise, as opposed to an 'actuarial' one: Peter Ramsay, 'What Is Anti-Social Behaviour?' (2004) 11 Crim LR 908, quoting Barbara Hudson, *Justice in the Risk Society* (Sage 2003), 48-49.

<sup>135</sup> Ramsay (n 136) 915.

<sup>136</sup> CDA 1998, s 1(a).

<sup>137</sup> Ramsay (n 156) 911, referring to Emily Finch's work on stalking and harassment in particular: Emily Finch, 'Stalking the perfect stalking law: an evaluation of the efficacy of the Protection From Harassment Act 1997' (2002) 9 Crim LR 703.

<sup>138</sup> See above the decision to keep this exercise an 'evaluative' one, (n 133).

<sup>139</sup> Ramsay 'What is Anti-Social Behaviour' (n 134), 917.

**b) ASBOs and the protection of 'vulnerable autonomy'**

In his work on ASBOs, Ramsay sees this approach to the social problem of anti-social behaviour as related to a 'specific trend in recent criminal legislation',<sup>140</sup> considered in the context of a 'political sociology of the substantive criminal law'.<sup>141</sup> He presents this trend as the recognition and protection of a 'right to security' as a specific, legally protected interest. In this context, he believes that most academic criticism of ASBOs has failed to take seriously the claim of an influential body of contemporary political thought which offers a normative justification for punishing harms to individuals' right to feel safe. Consequently, Ramsay claims that 'the ASBO itself has been consistently misread as a punishment for morally offensive behaviour'.<sup>142</sup>

According to this theory, the obligation imposed by ASBOs is seen as an 'order' which creates a duty owed to the state in respect of a newly recognised right of individuals to feel safe.<sup>143</sup> Anti-social behaviour would therefore represent a separate wrong from criminal behaviour, based on the threat it creates rather than the actual harm it causes. As a result, Ramsay considers ASBOs to be instruments of threat assessment and risk management rather than traditional legal mechanisms to impose liability.<sup>144</sup> Their focus on a particular individual's behaviour can be justified by the protection of what Ramsay calls the 'vulnerable autonomy' of others.<sup>145</sup> This concept forms the foundation of the aforementioned right to security which the orders are deemed to protect, and lies at the heart of a particular conception of citizenship. According to him, the individual's status as a citizen forms the basis for the creation of individual penal obligation in the form of ASBOs: citizenship in this theory represents

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<sup>140</sup> Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP, 2012), 6.

<sup>141</sup> *ibid*, 15.

<sup>142</sup> Ramsay, *The Insecurity State* (n 140), 11.

<sup>143</sup> Ramsay uses the term in opposition to a law or a penalty. According to him, these penal obligations 'come into existence following a specific intervention of the executive, overseen by the courts, in pursuit of security aims and they apply only to particular individuals,' *ibid*, 56-57.

<sup>144</sup> *ibid*, 51.

<sup>145</sup> The concept of 'vulnerable autonomy' is central to Ramsay's work on ASBOs, and was developed in his thesis before becoming the central tenet of his book *The Insecurity State* (n 140).



not just a straightforward legal status, but also a desirable activity which calls for regulation and protection by the criminal law.<sup>146</sup>

Ramsay's social-scientific take on the orders' legitimacy therefore reveals a broader justification for ASBOs based on trends towards the protection of individuals' sense of security.<sup>147</sup> These trends, which he derives from current political movements, are exhibited in the criminal law in general.<sup>148</sup> Whilst he remains sceptical as to their normative attractiveness, his analysis of the ASBOs' legal, historical and political context presents a compelling account of their purpose. In this broad approach, he construes the relationship which the orders seek to regulate as based on a notion of citizenship which ultimately differs from the concept of community unveiled in this thesis. According to him, an individual is responsible to the state as a legal enforcer of other citizens' interests. Although this approach does not explore the concept of community itself as the relationship underlying the imposition of liability, it does give a justification for ASBOs which reflects the Lords' depiction of the social problem the orders were designed to tackle, albeit taking a different perspective.

This thesis takes a narrower point of view, looking at the normative role of the concept of community in the justification of the orders, rather than focusing on their broader political justification. This notion of community will be developed throughout the following section and chapters. It differs from the social context of citizenship in terms of scope and the nature of socialisation it represents. As will be discussed in chapter four, citizenship refers to a social grouping of individuals considered in relative isolation from each other, and generally represents one uniform entity. By contrast, the concept of community in this thesis underlines the social connections drawing

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<sup>146</sup> See Ramsay *The Insecurity State* (n 140) 58-59; his approach to citizenship is developed more fully in Peter Ramsay, 'Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 (1) *The Modern Law Review* 29; also discussed in ch 4 (n 30).

<sup>147</sup> He takes a social-scientific approach to the concept of legitimacy, which approaches normative justifications of the law examining whether it is based on shared beliefs; his enquiry 'is not whether the legal powers that subjects consent to are normatively right according to an abstract principle, but what makes these powers legitimate in the context of a particular society at a particular time,' Ramsay, *The Insecurity State* (n 140), 7.

<sup>148</sup> *ibid* 10; Ramsay examines this interpretation of the orders from the normative perspective of three current political movements: Neoliberalism, the Third Way and Communitarianism. All three, according to him, can provide a justification for the use of orders such as ASBOs, which impose sanctions for creating a threat and failing to reassure others; see in particular Peter Ramsay, 'Theory of Vulnerable Autonomy and the Legitimacy of CPOs' in Bernadette McSherry, Alan Norrie, and Simon Bronitt (eds), *Regulating Deviance* (Hart 2009), 122.

these individuals together, with less focus on their autonomy, creating a number of different communities within one nation or society. This perspective to the relational nature of liability is introduced in the following section in the context of the distinction between civil and criminal liability, and will then be developed in more detail in further chapters.

## **2. Redefining the civil / criminal continuum: relationships and liability**

This section will argue that the continuum between civil and criminal law stretches between the civil law's attempts to regulate the relationships between individual parties, and the criminal law's attempts to regulate an individual's relationship with the state, as a representative of society in general. This is not meant to represent accurately the whole of either civil or criminal law, but rather aims to illustrate the spectrum of interpersonal relationships different systems of liability seek to regulate. A more complete understanding of these relationships can then help situate, and better define, ASBOs' position on the continuum.

From a procedural perspective, the definition of which party has a right to bring an action in a particular case highlights how each model of liability focuses on a particular type of social relationship. In the case of civil law, the right of action rests with the individual or party hurt by the wrong in question. Although this party will sometimes have a public function and represent a more general social interest (for example in the case of local authorities or social landlords), their right to bring a civil action rests on the existence of a specific duty.<sup>149</sup>

Criminal law, on the other hand, is focused on the relationship between the individual and society in general, as represented by the state. As a rule, the action against a defendant accused of a crime will be brought by the state or its representatives, while the victim's role in the process is generally limited to that of a

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<sup>149</sup> See for example the right for local authorities to bring an action for public nuisance injunctions, under the Local Government Act 1972, s222; see above text at n 82.

witness.<sup>150</sup> In certain limited instances, private prosecutions can be brought in criminal cases, as stipulated by statute.<sup>151</sup> This right is not, however, based on a personal claim that the 'private prosecutor' would have against the defendant in question, but rather 'operates and has been explained at the highest level as a safeguard against wrongful refusal or failure by public prosecuting authorities to institute proceedings.'<sup>152</sup> The existence of private prosecutions does not alter the 'public' nature of criminal liability with regard to the relationship its right of action is based on. Any prosecution brought by the state for a criminal offence will be as a representative of society. If it is brought by an individual, it will be deemed to represent the interests of society in light of the state's failure to bring proceedings.

From a functional perspective, the remedies available for civil and criminal actions also reflect the different relationship they seek to regulate. In civil law, remedies available are generally an injunction, destined to coerce the responsible party into changing his behaviour, or financial damages to compensate for the wrong caused. The nature of these actions is directly related to the aim they are designed to achieve: to bring the parties back to an equal footing and rectify the wrong that has been done by one to the other. This balancing objective is made even clearer in cases involving financial calculations to determine how much the responsible party will pay the plaintiff.<sup>153</sup> Civil liability provides a means to redress a situation between the individual parties, based on the interaction between them, whether through explicit offer and acceptance or not.

By contrast, at the most basic level, the function of criminal law is to impose punishment and deter potential criminals, in order to protect society as a whole. Although the harm caused to a specific victim may be considered at the sentencing stage, it is not paramount in determining liability. The imposition of criminal liability is not designed to mend the relationship between the offender and the victim, but rather

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<sup>150</sup> Although in another instance of blurring between civil and criminal principles, victims of crime have been given an increasingly important role in the criminal trial. For more details, see Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (OUP 2007).

<sup>151</sup> Prosecution of Offences Act 1985, ss 6(1) and 6(2); the right is however limited by the DPP's right to take over, and terminate, any private prosecution if there is no 'realistic prospect of prosecution,' according to *R(Gujra) v DPP* [2012] EWHC 472.

<sup>152</sup> *Jones v Whalley* [2007] 1 AC 63, [43] (Lord Mance).

<sup>153</sup> See for example Steiker (n 53).

focuses on improving the offender's relationship with society in general, through retribution, protection and reformation.

Viewing the civil/criminal distinction through the prism of the 'relationship' on which each is based brings us back to principles of Roman law and early common law. In these early systems, one act could attract both a civil and a criminal action depending on the wish of the victim, based on either his relationship to the individual causing the harm or to the king. As discussed earlier in this chapter, the civil action condemned individual harm caused to the victim and awarded compensation, whereas the criminal action was aimed at providing punishment, in the form of a fine that went to the king or imprisonment.<sup>154</sup>

This approach is still used in practice in modern law, where many actions attract the possibility of both a civil action and a criminal charge. The act of dishonestly depriving another of his property, for instance, is both the crime of theft, as well as the tort of conversion.<sup>155</sup> Liability for the former is designed to punish the thief and protect society as a whole, whereas liability for the latter is aimed at compensating the victim of the conversion for his loss and, through the possible use of an injunction, putting pressure on the culprit to repair the situation. Each action is defined by the relationship it aims to regulate: a public relationship between the defendant and the state and society in the crime of theft, a private one between individual parties in the tort.

The overlap and confusion frequently associated with hybrid instruments may in fact derive from the different social relationship each liability is based on. Civil contempt and public nuisance injunctions presented earlier in this chapter illustrate how the purposive mixture of civil and criminal elements can be the legal representation of attempts to regulate social relationships which are not regulated by existing models of liability. Because these specific relationships do not fall readily into either criminal or civil traditions, they can prove elusive.

In the case of public nuisance injunctions, although the initial criminal offence is based on the relationship between the state and the individual committing the nuisance, the recognition of specific harm caused by the nuisance to another individual

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<sup>154</sup> Seipp (n 54).

<sup>155</sup> The offence of theft is defined in the Theft Act 1968, s 1.

party led to the introduction of a civil action. The injunction is designed to stop harmful behaviour before it happens and prevent the causing of harm to a specific individual. This is despite (or to complement) the criminal offence that was created to punish the causing of such harm and to set boundaries in the relationship between the individual and the state and society as a whole.

In civil contempt, the initial injunction is civil, directly invoking the relationship between specific parties, and designed to regulate a potentially harmful situation between them. However, an individual's relationship with the justice system and society as a whole becomes highly relevant with non-observance of the injunction. His disregard for the injunction not only affects his relationship with the specific party it was designed to protect, but also positions him as a threat to society and the state because of his disregard for the courts' authority. This calls for the intervention of the criminal law, which seeks to regulate his relationship with society in general and its representative the state.

These analyses of hybrid instruments are unavoidably simplified, but nonetheless point to the significance of community relationships in the determination of liability, and how civil and criminal elements can be mixed to regulate individual behaviour within a particular social relationship.

### **3. ASBOs and the community relationship**

Having postulated that ASBOs' dual nature is informed by the relationship the orders seek to regulate, placing them somewhere in between civil and criminal law, we must now explore the actual nature of that relationship. If we take the example of the *McCann* case, it appears to be focused on the relationship between neighbours, or simply people living in the same community. The proximity and familiarity between the individual responsible for the behaviour and those affected by it calls for the use of the initial civil injunction, the terms of which stipulate rules of conduct for the offender when interacting with those affected by his behaviour. Upon the breach of those rules of conduct, the behaviour is deemed to call for the imposition of criminal liability,

signifying the severity with which the offence is considered, and the role of the state and society at large in regulating and protecting that community relationship.

As we have seen, ASBOs' legal provisions and their interpretation rely on the notion of community as the social relationship underlying the imposition of responsibility. In its extreme, simplified form, criminal law seeks to regulate the relationship between individuals and society in general, and community involves a social relationship between many different individuals as a group. On the civil/criminal continuum, therefore, this may situate ASBOs closer to criminal liability.

To further refine the nature of the relationship which will form the basis for the imposition of liability through ASBOs, it is useful, then, to examine how the public nature of criminal law has been interpreted. First, in relation to the social relationship it seeks to regulate, and then in how it differs from the concept of community used in ASBOs.

In his examination of the Roman and civil law concepts of delicts,<sup>156</sup> Dubber defines the 'public' nature of criminal law as the public taking an 'interest in crime, rather than crime directly violating the public's interest.'<sup>157</sup> Crime is by nature an 'interpersonal event between one person (labelled offender or perpetrator) and another (labelled victim),' yet the public takes an interest in criminalising this event.<sup>158</sup> This interest is not based in any interference with the state's role as a political entity, but relates specifically to its role in protecting the interests of its constituents in the face of harm. In this view, the public nature of criminal law is therefore not a function of whether an action has hurt what is considered the interests of the public, but rather whether the public, through its representative, the state, can rightly take an interest in regulating the behaviour which has been inflicted by one individual on another.

Searching for an 'overall fit' for the nature of crime, Lamond adopts a similar approach to the public nature of criminal law. According to him, it represents not so much a violation of interests which can be attached to the public in any meaningful

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<sup>156</sup> The term here is used to contrast with the common law system, rather than the criminal law.

<sup>157</sup> Dubber (n 54), 210-211.

<sup>158</sup> *ibid*, 210.

sense, but rather a wrong in which the public can rightly take an interest.<sup>159</sup> This interpretation of the public nature of criminal law distinguishes it from private civil law based on the identity of the entity who will take (or be granted) an interest in addressing a particular wrong. Although Lamond sees parallels that can be drawn in relation to the ownership of an action, he asserts that the interest taken by the public in criminal cases differs from that taken by private parties in civil actions: 'it is not the community's wrong in the sense that it belongs to the community, thereby giving it a wide discretion whether to pursue the action, but in the sense that the community is charged with determining whether a proceeding is in the public interest.'<sup>160</sup>

This idea that the state, and by extension the public, can impose criminal liability by taking a rightful interest in regulating a particular behaviour is therefore not based on a predetermined right, defined by the violation of specific interests. Rather, it is a reflective exercise, designed to consider the nature of the interaction between the individual being held responsible, those affected by his behaviour, and those holding him liable.

Both interpretations draw parallels with other, smaller institutions which also impose rules and punishment on their members. Dubber relies on the historical concept of the 'household', which formed the basis of Roman public law 'as the direct continuation of the original model of Roman governance, of the household by the householder, of the *familia* by the *pater familias*.'<sup>161</sup> Lamond invokes existing social institutions, such as schools, families, workplaces, etc which have rules and regulations upholding certain values, and where the violation of these rules can lead to punishment in various forms, even exclusion from the group.<sup>162</sup>

By focusing on the nature of the relationship as a defining characteristic of the criminal and civil law, these theories eschew any rigid construct in which civil wrongs hurt individuals and private interests, while criminal wrongs hurt society or public interests. Instead, the public nature of wrongs in question defines crimes not because of the particular interests that are to be protected (often the same as the interests

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<sup>159</sup> His objection is directed at Nozick's concept of criminal wrong as causing a 'fear' of crime, as well as Marshall and Duff's theory that a harm caused to an individual will be a crime when it violates some value or interest which defines the community in question, causing a distinct harm.

<sup>160</sup> Grant Lamond, 'What Is a Crime?' (2007) 27 (4) OJLS 609, 620.

<sup>161</sup> Dubber (n 54), 194.

<sup>162</sup> Lamond (n 160), 625.

protected by the civil law) but by the existence of an interest *in* the prosecution and punishment of a wrong. While the nature of the wrong, as well as the function and procedure followed by each system, are relevant factors in shaping the appropriate 'forum', the determining factor lies in this notion of responsibility, which itself stems from the relationship each system seeks to regulate.

This approach to the public nature of criminal law generally relies on the relationship between the state and the individual. Dubber associates this relationship with the state's role in the protection of an individual's personhood.<sup>163</sup> He sees individuals as autonomous, free and equal within the state, and not necessarily defined by their relations with each other, except in the commission of criminal offences. As such, the interpersonal nature of crime is limited to objective interaction and the causing of harm between individuals, and does not validate the nature of that relationship or social interaction as relevant to the definition of the criminal law. The concept of a community of individuals is not reflected in this approach to liability, and is not considered by Dubber as a relevant characterisation of the relationship.<sup>164</sup>

In contrast, Lamond does acknowledge the importance of the relationship between individuals, and uses the concept of community to explore it. The rightful interest being taken by the public or, as Lamond refers to it, the *community*, is justified by the relationship linking it to the individual. But in his view, community is not clearly defined, and appears to be interchangeable with the notion of a public, state, polity or society. Furthermore, in discussing its nature in relation to crime, Lamond dismisses values as a defining element of a community 'except in the weak sense that they are the *set* of values that may be distinctive to this community, and distinguish it from other communities.'<sup>165</sup> In his opinion, members of contemporary communities do not

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<sup>163</sup> He defines the state as a 'collection of individuals, institutions, animate and inanimate objects, practices, and so on that brings to life the idea, or if you like the ideal or promise, that all persons can be legitimately governed only as persons, which means they are fundamentally equal (as persons) and free (as persons),' Dubber (n 54), 191.

<sup>164</sup> In fact, Dubber expressly rejects the need for individuals to be 'brothers', as well as free and equals: 'it would be nice if they were also brothers and sisters, but I do not think the idea of *fraternité* is essential to that of the state in quite the same way as are those of *liberté* and *égalité*, which might explain why the French Revolutionaries denied it the pride of first, or second, place on their shortlist of demands,' *ibid*.

<sup>165</sup> Lamond (n 160), 617.



identify with each other because of shared values: they are simply part of a wider shared society which he equates with the notion of community.

These accounts demonstrate how wider social relationships can shape and justify the imposition of liability, beyond direct interpersonal interactions, as is the case in ASBOs. However, to justify an imposition of liability through the legislative technique created in ASBOs, we must explore and more completely define the concept of community as a social group distinct from society and the notion of citizenship developed in Lamond's but also Ramsay's accounts.<sup>166</sup> It is this inquiry which will guide this thesis' account of how the orders operate in practice and can be justified in theory.

#### **IV. Conclusion - Hypothesis**

The hypothesis drawn from these observations is that ASBOs, by combining civil and criminal elements, take a particular approach to liability, seeking to regulate the behaviour of individuals in their relationship with a given community. This sets ASBOs apart from both civil and criminal liability. The orders focus on a relationship that is wider than the individual one sanctioned by civil law and narrower than the one between an individual and society in general, which informs the imposition of criminal liability. This relationship is characterised as a unique community, conceptually distinct from the notion of society, and informs the use of an initial civil injunction, as well as the creation of a discrete criminal offence signifying the severity with which anti-social behaviour is considered.

The first part of this thesis will examine ASBOs in more detail, aiming to identify the role of the concept of community as it informs liability in the orders.

Chapter two will explore the political genesis of ASBOs, and how the combination of civil and criminal law was actually meant to target a specific type of individual behaviour, defined by the harm caused to a community. Because of the lack of

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<sup>166</sup> See above (n 146).

definition of certain key terms, as well as the reliance on judicial discretion, the initial orders failed to provide sufficient guidance as to what constituted a community. But while the orders were indeed initially focused on community as a local geographic setting, the legislative intent was ultimately broader. This thesis will argue that the community relationships, within which liability can be imposed, go well beyond geography from both a theoretical and practical perspective.

Chapter three will focus on the judicial interpretation of ASBO legislation, and how the courts have applied and refined them in a way which reinforces the importance of the relationship between the individual being held responsible and the community affected by his behaviour. Although case law stops short of actually defining the nature of the community relationship in question, it does provide evidence of how that relationship affects the imposition of liability in practice. In particular, four specific examples are identified where this focus on a community relationship has shaped the nature of the liability imposed in ASBOs.

The second part of this thesis will examine the theoretical principles underpinning an alternative model of community-based liability, providing a framework to better understand how ASBOs effectively regulate the relationship between an individual and a particular community.

Chapter four will first explore the traditional concept of criminal liability, highlighting the significance of liberal principles in constructing an asocial and autonomous figure of the responsible individual. Then an alternative model of community-based liability will be examined from the perspective of communitarian and socio-legal principles. This perspective preserves and fosters individual autonomy but, importantly, also views the nature of the individual as constituted by social relationships. The concept of community is constructed as a flexible and open concept, based on the existence of specific, protected interests, the violation of which defines the harm to that community and can give rise to liability. This characterisation of the relationship between the figure of the socially constituted individual and a particular community provides a framework to examine liability in ASBOs. In a community-based liability model, an individual can be held liable to a community for

behaviour that interferes with its protected interests, thus harming it, if it is shown that he *wilfully engaged* with that community.

Chapter five will return to case law to illustrate how these defining elements of a community-based model of liability have been applied—and sometimes misapplied—in practice, highlighting a number of potential risks and limitations. Finally, the dual nature of ASBOs will be examined and reframed in the context of this new model of liability.

## **CHAPTER 2 – FROM CSOs TO ASBOs: UNDERSTANDING THE DUAL NATURE OF ASBOs AND THE CONCEPT OF COMMUNITY IN THEIR POLITICAL CONTEXT**

This chapter first explores the community relationship at the heart of ASBOs through the political process which led to their adoption. In political discourse, the introduction of the ASBO has been simplistically portrayed as filling a ‘gap’ left vacant by civil and criminal justice. But as this chapter will aim to show, the drafting of the orders’ legislative provisions was deeply influenced by New Labour’s take on communitarianism, and intentionally directed liability towards community relationships. These political origins and the specific legislation that was drafted reflect the fact that this notion of community is wider than the private relationships civil liability is concerned with, but narrower than the broader social relationship that informs criminal liability.

Whilst situating ASBOs on a civil/criminal continuum, the CDA stopped short of clearly defining the exact nature of this community relationship, and the orders’ reliance on flexibility and judicial discretion creates an additional degree of uncertainty in its definition. Still, this chapter will propose that specific procedural characteristics of the ASBOs and the flexible legal definition of the concept of ‘anti-social behaviour’ represent a means to take into account the relationship between the individual held responsible and those members of the community affected by his behaviour.

### **I. Introducing Dual Orders: from CSOs to ASBOs**

The introduction of ASBOs in 1998 by the newly elected New Labour government was preceded by a number of other hybrid orders. The policy documents and legislative initiatives which accompanied the introduction of these earlier orders provide a context which illuminates the benefit of combining civil and criminal elements when seeking to protect community relationships.

## **A. Dual Civil/Criminal Orders before ASBOs**

Two policy documents published while New Labour was still in opposition introduced the ASBO's precursor, the Community Safety Order (CSO), which explicitly focused on anti-social behaviour within small, localised settings. In addition, hybrid civil/criminal orders were proposed to address the emerging social problem of stalking, culminating in the Protection from Harassment Act 1997. These orders focused on the impact of the subject's behaviour rather than its inherent criminality, and provide important context for the introduction of the ASBO.

### **1. Community safety orders: the precursors to ASBOs**

#### ***a) 'A Quiet Life': introducing the community safety order***

The idea of a new type of order to tackle anti-social behaviour was developed by New Labour while still in opposition. CSOs were presented in a consultation paper entitled *A Quiet Life: Tough Action on Criminal Neighbours* ('*A Quiet Life*'), and were constructed as a civil order with criminal consequences upon breach.<sup>1</sup> The title's direct reference to 'criminal neighbours' illustrates the emphasis the report places on targeting harmful behaviour in a small localised setting, construed therein as a council estate. The orders were designed to target the cases of people whose lives, *A Quiet Life* claimed, 'are made a misery by the people next door, down the street or on the floor above or below.'<sup>2</sup>

Because of the chronic nature of this type of behaviour, and the alleged inadequacy of criminal procedures in dealing with it, *A Quiet Life* recommended the creation of a special form of injunction to act as a new type of remedy. Like ASBOs, CSOs initially consisted of a civil injunction for harmful behaviour, to be obtained in the Magistrates' Court. The injunction 'would be there to restrain anti-social behaviour by

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<sup>1</sup> The paper was developed in particular by Jack Straw, who took over as shadow Home Secretary from Tony Blair after he was elected as leader of the party in 1995; Labour Party, '*A Quiet Life: Tough Action on Criminal Neighbours*' (1995).

<sup>2</sup> *ibid*, 1.

those named on it [and] could include curfews, exclusion from a particular area, restraints on approaching individuals, uttering threats, making noise of specified kinds and desisting from racist behaviour.’<sup>3</sup> Breach of the order would be treated as a criminal offence, with all sanctions available, including imprisonment.<sup>4</sup>

*A Quiet Life* presents anti-social behaviour as a wide-scale problem and identifies examples such as drug-related behaviour and racial harassment, as well as suggested high-levels of repeat victimisation and repeat offending.<sup>5</sup> Without fully substantiating these claims, it relies on two cases to illustrate the type of behaviour the orders were meant to tackle.<sup>6</sup> Both dealt with individuals who were reported to be terrorising their neighbours, and whose behaviour had been, according to the report, unsuccessfully tackled by existing legal instruments. In the first case, two brothers were found to have been behaving badly on a council estate in which they did not reside, but considered their ‘patch’.<sup>7</sup> According to the policy documents, the brothers’ activity caused residents to live in fear, some even allegedly abandoning their homes due to the relentless intimidation. Despite criminal proceedings and sentences of imprisonment, the use of criminal remedies had failed to prevent the brothers’ behaviour overall. Coventry City Council obtained injunctions setting up exclusion zones barring the brothers from the estate in question.<sup>8</sup> The action was eventually withdrawn when it came to full trial because key witnesses failed to testify against the defendants<sup>9</sup>, but according to *A Quiet Life*, Coventry had made legal history nonetheless.<sup>10</sup>

The second case concerned a family who was described by local police as terrorising their neighbours, causing many local residents to live in fear.<sup>11</sup> Although no civil injunction was ever sought, various members of the family were prosecuted for

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<sup>3</sup> ‘A Quiet Life’ (n 1), 8.

<sup>4</sup> *ibid*, 9.

<sup>5</sup> *ibid*, 3.

<sup>6</sup> The report recognises that there is ‘no nationwide records which can measure quantitatively the scale of the problem,’ *ibid*, 3.

<sup>7</sup> The guidance document for the CDA 1998 summarises the cases mentioned in ‘A Quiet Life’ (n 1): Home Office, ‘Crime and Disorder Act: Guidance Document – Anti-Social Behaviour Orders’ (2000).

<sup>8</sup> ‘A Quiet Life’ (n 1), 3; referring to an injunction obtained by Coventry City Council under Local Government Act 1972, s 222.

<sup>9</sup> *Coventry CC v Finney*, [1995] QBD, 432.

<sup>10</sup> ‘A Quiet Life’ (n 1), 3.

<sup>11</sup> The guidance illustrates the impact of the behaviour with specific testimony, ranging from a mother who was followed on her way to her daughter’s school every day, to others who slept on their front room for fear of going to bed or would not leave their house unattended, see ‘A Quiet Life’ (n 1), 4, and Home Office, ‘CDA: Guidance’ (n 7).

criminal acts including attempted robbery, burglary, theft, damage and public disorder.<sup>12</sup> The prosecutions led to a number of non-custodial sentences,<sup>13</sup> and the family was evicted twice until they moved to privately rented accommodation where the local authority could no longer evict them.<sup>14</sup> Despite efforts by the local police, the report found that 'the normal criminal process did not prove effective in dealing with the scale of the disruption.'<sup>15</sup>

Based on these two case studies, *A Quiet Life* concluded that in those situations, neither civil nor criminal remedies were effective in dealing with the harmful behaviour. In particular, it found that 'criminal procedures have never been designed to curb chronic and persistent anti-social criminal behaviour and so, as they stand, are themselves defective.'<sup>16</sup> This defect was presented as a system failure, which called for the creation of new remedies, in the shape of a dual civil and criminal order.<sup>17</sup> It would consist of an initial civil injunction subject to the rules of civil evidence, in particular the admission of hearsay evidence.<sup>18</sup> Breach of the injunction would then be a de facto criminal offence, with a specific focus on the availability of all criminal sanctions, including imprisonment.<sup>19</sup>

The behaviour in these examples represents different instances of criminal acts, but the suggested hybrid orders go beyond simply ensuring the criminalisation of those acts. The local character of the anti-social behaviour is central to *A Quiet Life's* recommendations and the suggested remedy: behaviour is considered more harmful precisely because of its context, and because it is perpetrated by others living in very close proximity to those affected by it. Intimidation of victims and witnesses is cited as the reason why the anti-social behaviour cannot be adequately addressed by the traditional criminal justice process, and CSOs were proposed as the most effective and

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<sup>12</sup> The case came to the attention of the authors of the report through a letter written to Jack Straw by the local police force in May 1994, see Andrew Rutherford, 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain', in Penny Green and Andrew Rutherford, (eds) *Criminal Policy in Transition* (Oxford: Hart, 2001), 45.

<sup>13</sup> 'A Quiet Life' (n 1), 5.

<sup>14</sup> Home Office, 'CDA: Guidance' (n 7), 20; CDA 1998, s 8.

<sup>15</sup> 'A Quiet Life' (n 1), 5.

<sup>16</sup> *ibid*, 1.

<sup>17</sup> *ibid*, 8.

<sup>18</sup> *ibid*, 9.

<sup>19</sup> At that time, the suggestion was that the maximum sentence could be 7 years, and that there should be a 'normal expectation that a breach of a CSO would be punished by a custodial order' for adults; *ibid*, 10.

reasonable solution to deal with it.<sup>20</sup> Both cases cited in the report emphasise the importance of the highly specific local context in which the behaviour occurred, and the social relationships within that setting which the CSOs sought to regulate. As we will explore in the next section, later policy developments broadened the context in which dual orders would apply well beyond the local setting of council estates.

***b) 'Protecting Our Communities': broadening the orders***

The publication of another report by New Labour in 1996 clarified the approach and seemed to adopt a broader focus for the orders' purview. The report, entitled *Protecting our Communities*, attached the use of civil/criminal orders to the perceived need to protect communities from what was considered as criminal anti-social behaviour within neighbourhoods.<sup>21</sup>

This represented a shift from the approach taken in *A Quiet Life*, where the focus of the orders was set firmly on 'criminal neighbours' and anti-social behaviour which occurred within housing estates. Instead, the new report referred to anti-social behaviour taking place in a wider neighbourhood or community, and considered the application of the orders within a new frame of reference. Its focus on the role of local agencies such as local government and police authorities in tackling anti-social behaviour also helped to widen the scope for application of the orders.<sup>22</sup> Intimidation and repeated exposure to anti-social behaviour wasn't unique to council estates, and the 1996 report attempted to liberate some of the perceived advantages of hybrid orders, suggesting they could be used in other related settings in which local authorities were present.

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<sup>20</sup> Beyond the legal implications of the orders' nature, this approach to tackling disorder has been criticised from a sociological and political perspective, with claims that the focus on anti-social behaviour represents a new domain of social control, and that 'being seen to be doing something tangible in response to local demands and to assuage public perceptions via the micromanagement of uncivil behaviour has become an increasingly prominent governmental *raison d'être*,' Adam Crawford, 'Dispersal Powers and the Symbolic Role of Anti-Social Behaviour Legislation' (2008) 71(5) MLR 753, 755 (original emphasis); see also Alison Brown, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43(2) Howard J of Crim Justice, 203.

<sup>21</sup> Labour Party, 'Protecting Our Communities' (1996).

<sup>22</sup> See below, text to n 92 for more details.



Although these reports are essentially statements of intention and bear little legal significance in themselves, they point towards an important evolution in thought about dual civil and criminal orders, especially with regard to setting. As we will see, this broadening of scope with regard to the use of dual orders would prove prescient and was reflected in related legislative developments.

## **2. Stalking and Anti-social behaviour: context-dependent behaviour and the community relationship**

In addition to policy documents, New Labour also used the concept of dual civil and criminal orders in other legislative endeavours: first in the tabling of an amendment to the conservative Housing Bill in 1995, then as part of a private member's Bill on stalking in 1996. Although the amendment was ultimately rejected, it arguably put the concept of dual orders on a political agenda which culminated in the Protection from Harassment Act 1997. Though less far-reaching than CSOs, these versions of the orders embodied the same central premise: regulation of a specific relationship between a responsible individual and those directly affected by his behaviour, separately from or in addition to criminal liability.

### ***a) Putting dual orders on the legislative agenda: the Housing and Stalking Bills***

The first occasion for New Labour to trial their concept of hybrid orders came with the introduction of a new Housing Bill in 1995.<sup>23</sup> The shadow housing minister Nick Raynsford tabled an amendment that introduced a CSO to supplement local authorities' powers, claiming that the Bill did not go far enough. Although his amendment was ultimately rejected, the Labour party persisted in its approach and issued 'Protecting our Communities', in which it attacked the government's lack of vision and denounced its weak attempts to deal with anti-social behaviour in

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<sup>23</sup> Which eventually became the Housing Act 1996.

neighbourhoods.<sup>24</sup> The close timing between the amendment and the report highlights how committed the party was to using dual orders to tackle anti-social behaviour.

Dual civil and criminal orders also played a part in the introduction of a private member's Bill in May 1996, which dealt with the politically sensitive subject of stalking and harassment.<sup>25</sup> The Bill, if passed, would have created an order similar to the CSO: a magistrates' court could make such an order against alleged stalkers, breach of which would constitute a criminal offence punishable by up to five years' imprisonment on indictment.<sup>26</sup> The Bill was defeated for lack of support from the government,<sup>27</sup> and another similar Bill was put forward and defeated again in the House of Lords a few months later.<sup>28</sup>

Despite the failure of both Bills, the subject attracted an important amount of public attention, and in 1997 the government eventually passed the Protection from Harassment Act 1997 (the Harassment Act).<sup>29</sup> The Harassment Act introduced a range of measures, both civil and criminal, including the possibility of a restraining order in any case where a defendant is either sentenced or 'dealt with' by the court, breach of which can lead to five years' imprisonment.<sup>30</sup> These orders were distinguished from more traditional injunctions available under section 3 of the Harassment Act,<sup>31</sup> and arguably represented the first legislative incarnation of dual orders.<sup>32</sup>

The dual nature of the orders attracted little attention when the Bill was passed, but the nature of the behaviour in question was discussed at length. As presented in

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<sup>24</sup> 'Protecting our Communities' (n 21).

<sup>25</sup> The bill was introduced by Janet Anderson MP and failed on the 10 May 1996; for a wider context of the emergence of the issue of stalking, see Emily Finch, 'Stalking the perfect stalking law: an evaluation of the efficacy of the Protection From Harassment Act 1997' (2002) 9 Crim LR 703; some have also referred to this interest in stalking as the emergence of a potential 'moral panic': Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law*, (Cambridge University Press 2010), 232.

<sup>26</sup> The order is referred to as a 'prohibitory order'; House of Commons, 'Stalking, harassment and intimidation and the Protection from Harassment Bill' (Research Paper 96/115, 13 December 1996).

<sup>27</sup> 'Home Office drops support for stalking Bill' *The Independent* (London, 7 May 1996) <<http://www.independent.co.uk/news/home-office-drops-support-for-stalking-bill-1346020.html>> accessed 8 December 2014.

<sup>28</sup> Stalking (No. 2) HL Bill (1995-96) 92, introduced by Lord McIntosh, although it was amended before being rejected and the provisions relating to the dual prohibitory orders were dropped.

<sup>29</sup> For a more general discussion of the definition of stalking and harassment as a legal concept, see Emily Finch, *The Criminalisation of Stalking* (Cavendish 2001).

<sup>30</sup> Protection from Harassment Act 1997 (PHA 1997), s 5(1).

<sup>31</sup> They were described as an 'enforced cooling off period with teeth'; Jessica Harris, 'Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997' (HORS 210, 2000), 43.

<sup>32</sup> The argument is made in more details in Rutherford (n 12), 48-50.

the following section, these discussions often drew a parallel between stalking and anti-social behaviour.

***b) Refining the community thread in ASBOs: stalking, anti-social behaviour and context-dependent crime***

The use of dual civil and criminal orders in the context of stalking serves as a prototype for the regulation of relationships based on interactions rather than local or geographical proximity. Stalking and harassment in general are not precisely defined in the Harassment Act.<sup>33</sup> Section 1(1) prohibits harassment and states that:

- (1) A person must not pursue a course of conduct—
  - (a) which amounts to harassment of another, and
  - (b) which he knows or ought to know amounts to harassment of the other.<sup>34</sup>

The concept of harassment is interpreted in section 7(2) and ‘includes alarming the person or causing the person distress.’ This is determined subjectively, based on the victim’s perception of the conduct, and it is not exhaustive. The harassment has to be caused by a ‘course of conduct’ which involves, as described in section 1(1), ‘conduct on at least two occasions.’<sup>35</sup> The incidents need not be unlawful, but the prosecution must identify a ‘nexus’ between them.<sup>36</sup> Still, the behaviour will only trigger criminal liability if it has caused another to feel harassed throughout the course of conduct.<sup>37</sup> In addition, the Court of Appeal confirmed the objective mental requirement that the defendant knew or ought to have known that his course of conduct amounted to harassment.<sup>38</sup>

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<sup>33</sup> It has been observed that the provisions provide ‘a description rather than a legal definition,’ Lacey, Wells and Quick (n 25), p.232.

<sup>34</sup> A new section relating to the harassment of two or more persons has been introduced by the Serious Organised Crime and Police Act 2005 which inserted a section 1(1A) but this provision will not be examined here.

<sup>35</sup> This may include speech, according to PHA 1997, s 7(3)(a).

<sup>36</sup> *Lau v DPP* [2000] 1 FLR 799.

<sup>37</sup> *DPP v Ramsdale*, The Independent, March 19, 2001. In this case, the course of conduct spanned over 2 years but the charge was rejected because only one of these incidents actually caused the victim to feel harassed.

<sup>38</sup> Rather than any intention to cause or recklessness as to the causing of harassment or distress, *Colohan* [2001] 2 FLR 757.

The impact and process of stalking, as opposed to any intrinsic wrongfulness of action, are therefore the main determinants of liability, both in terms of the criminal offences of harassment outlined in sections 2 and 3 of the Harassment Act, and in terms of the use of restraining orders, which combine civil and criminal elements. As the definition of harassment implies, the wrongness of the conduct is not related to its specific nature, but in how the conduct is forced upon another against their will.<sup>39</sup> This is especially relevant when considering the use of restraining orders, which exemplify the 'acknowledgement that stalking is a continuing, frequently escalating, type of conduct that may not end when the stalker is prosecuted,' and whose dual nature represent the 'most effective weapon' against it.<sup>40</sup>

The characteristics of stalking which have made it necessary to introduce civil and criminal orders can be related to three essential components, according to Finch:

1. The ongoing nature of the behaviour and intransigence of the stalker;
2. The fact that the conduct is unwanted by its recipient; and
3. The fact that the conduct triggers a negative response from its recipient.

The focus of the law is not to 'proscribe certain forms of conduct as harassment per se but [to enable] the victim to determine the parameters of acceptable interaction on an individualistic basis.'<sup>41</sup> Furthermore, according to Finch, the victim's interpretation of the event is the most important factor in attributing liability,<sup>42</sup> creating a context-dependent approach to the definition of stalking, which will vary based on others' perceptions of the conduct in question.<sup>43</sup> This approach suggests that the effectiveness of dual orders in harassment and stalking comes from their

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<sup>39</sup> Finch 'Stalking the perfect stalking law' (n 25), 705; harassment is generally held to include stalking, which can be seen as a category of harassment, in the same way that shoplifting and mugging are sub-categories of theft; see also Celia Wells, 'Stalking: the Criminal Law Response' [1997] Crim LR 463.

<sup>40</sup> Finch 'Stalking the perfect stalking law' (n 25), 717.

<sup>41</sup> *ibid*, 706.

<sup>42</sup> Finch 'Stalking the perfect stalking law' (n 25), 706.

<sup>43</sup> Peter Ramsay, 'What Is Anti-Social Behaviour?' (2004) 11 Crim LR 908, 911-12.

ability to 'determine the parameters of acceptable interaction' in a given relationship between perpetrator and victim, based on the victim's perception of the behaviour.<sup>44</sup>

The relationship in this example is a relatively narrow one. It links the perpetrator of the behaviour and those directly impacted by the behaviour: this will typically include the victim himself and can include relatives if it is proved they were affected by the behaviour.<sup>45</sup> The fact that the large majority of stalking cases occur within a pre-existing personal relationship evidences the orders' relational nature and the obligations to which they give rise: prohibitions imposed set boundaries between the perpetrator and those affected, outlining precisely what is or isn't acceptable in their specific relationship.<sup>46</sup>

The harmful effect of stalking is therefore not measured by the specific objective harm caused by discrete acts, but is instead constituted by a number of factors, summarised as the relatively low impact or harmful character of the behaviour, the repetitive or 'chronic' nature of the behaviour and the local or personal character of the behaviour. A key difference between stalking and anti-social behaviour in this context resides in the third of these characteristics: the scope of the relationship in question.

Still, despite the narrower relationship at the heart of the stalking provisions, political discussions surrounding their introduction nevertheless drew a parallel between stalking and anti-social behaviour (as understood in the context of CSOs). In particular, the shadow Home Secretary Jack Straw directly linked the two, comparing anti-social behaviour to harassment committed by neighbours,<sup>47</sup> a position also adopted by a Conservative MP who mentioned rising concern about 'bad neighbours' and the perceived link between their behaviour and harassment.<sup>48</sup> This concern was

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<sup>44</sup> Finch 'Stalking the perfect stalking law' (n 25), 707.

<sup>45</sup> Terms of the orders have to protect the victim or a third party who is related to the victim, the individual being protected must be individually identified in the order (*R v Mann* (21 Feb 2000, unreported). This requirement is also amplified by the requirement that any prohibition imposed by a restraining order must be proved to be necessary to protect the victim or any relatives, and all persons to be protected by an order must be named in it.

<sup>46</sup> Behaviour which will generally be considered inoffensive or even a positive, such as writing a card or giving a gift, can become terribly threatening if it is part of a course of conduct of stalking.

<sup>47</sup> He saw in stalking 'a similar situation [...] in relation to anti-social behaviour by neighbours,' and portrayed anti-social behaviour as 'serious harassment by bad neighbours', HC Deb 17 December 1996, vol 287, col 792.

<sup>48</sup> HC Deb 17 December 1996, vol 287, col 801 (Sir Ivan Lawrence).

also present in the conservative Home Secretary's statement that the Harassment Act was intended to provide a protection against noisy neighbours.<sup>49</sup>

Jack Straw further conflated the two types of behaviour and reinforced their similarity by claiming that in both cases the criminal justice system had failed to adequately deal with such behaviour.<sup>50</sup> This failure was caused by the nature of stalking and anti-social behaviour, he argued, and in particular the fact that they are 'continuous, chronic criminal behaviour' which cannot be dealt with in snapshots as the criminal law does.<sup>51</sup>

Naturally, these sorts of political statements cannot necessarily be taken at face value.<sup>52</sup> But the parallel drawn does highlight how efforts to regulate a particular type of interaction or relationship can lead to a different approach regarding liability. Although the relationship characterised in stalking is not typically the same as that in anti-social behaviour, legislative attempts to tackle the latter have drawn from the approach taken to combat stalking. In the following section we will see how these attempts eventually culminated in the introduction of ASBOs.

## **B. Introducing ASBOs: the 'Gap' Narrative and the Dual Nature of the Orders**

Community relationships featured prominently in the policy documents and debates leading up to the adoption of the CDA. Yet neither the consultation presenting the dual 'community safety orders' in the run up to the Bill, nor the discussions of the Bill in Parliament, ever really engaged with the dual civil and criminal nature of the orders.

Without further detail, the argument that such orders were justified by the existence of a 'gap' between civil and criminal justice amounted to little more than political rhetoric and strategic communication. Still, the broader political

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<sup>49</sup> HC Deb 17 December 1996, vol 287, col 817 (Michael Howard).

<sup>50</sup> These types of comments suggesting the existence of a 'gap' in the justice system were numerous at the time and created a gap 'narrative' surrounding dual orders, as will be discussed below in s 1B2.

<sup>51</sup> HC Deb 17 December 1996, vol 287, col. 788.

<sup>52</sup> This is especially so in relation to the notion of a 'gap' left open by the failures of the criminal law, see below n 73.

arguments in favour of the orders are instructive, and arguably provide a more principled legal answer to their justification. New Labour's take on communitarianism embraced the notion of a wider social bond between individuals, and helped shape the philosophical and political framework that allowed ASBOs to become law.

## **1. Consultation and the Crime and Disorder Bill**

The introduction of the Bill that became the CDA was preceded by a consultation presenting the concept of 'community safety orders', as they were still then known. This consultation's short length and response time presaged the relative ease with which the Bill would be passed through Parliament. It also helped ensure the orders themselves would not be directly debated at any length, and contributed to the uncertainties regarding the underlying rationale for the orders that remained after the legislation came into effect. While community relationships feature prominently in those early documents, their definition remains elusive, oscillating between local neighbourhood relationships and wider, more amorphous groupings.

### ***a) The Consultation Paper***

After the 1997 election put them in government, New Labour began to build on the work it had done while in opposition to champion dual civil and criminal orders. In September of that year, it introduced a consultation paper about CSOs, titled 'Community Safety Orders: A Consultation Paper'<sup>53</sup> (the Consultation Paper). Drawing heavily on *A Quiet Life*, the consultation paper speaks of the need to provide those affected by this type of behaviour with more effective weapons and deterrents against the perpetrators. These were considered necessary to fill 'a serious gap in the ability of the authorities to tackle this social menace.'<sup>54</sup>

In discussing the nature of a CSO, the Consultation Paper does not prominently mention its duality, despite its non-traditional approach to liability. The CSO is

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<sup>53</sup> Home Office, 'Community Safety Order: A Consultation Paper' (1997).

<sup>54</sup> *ibid*, [1].

presented as a civil order which protects communities from anti-social conduct,<sup>55</sup> and the first mention of its criminal component does not come until halfway through the Paper, where 'it is proposed that Community Safety Orders will be enforced through criminal proceedings.'<sup>56</sup> The Housing Act 1996 and the Harassment Act are described as too limited in their reach, especially in situations where the harassment was not targeted at an individual or a family, but directed at a community, or where the behaviour may not fit the strict definition of harassment.<sup>57</sup> However, save for a parallel drawn between community and neighbourhoods, the exact nature of these communities was not addressed in the Consultation Paper.<sup>58</sup>

Nor does the Consultation Paper shed new light on the justification for creating dual civil and criminal orders to tackle anti-social behaviour. Although designed to inform the provisions contained in the CDA, its reliance on the term community as if it were a well-understood term and its failure to address the nature of those relationships contributed to uncertainties in the orders' justification and application.<sup>59</sup> This was true throughout the orders' legislative and implementation process. As will be discussed in the following section, the introduction of, and debate over, the Crime and Disorder Bill actually increased the ambiguity around the concept of the community relationship in ASBOs.

### ***b) Crime and Disorder Bill 1998: the last step to ASBOs***

The Crime and Disorder Bill clearly positioned ASBOs as the successor of the CSOs. As with the Consultation Paper, the government focused on the orders' civil nature and the opposition between 'good' victims and 'bad' neighbours to justify them.<sup>60</sup> The bulk of the parliamentary debate was occupied by personal stories from constituents

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<sup>55</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [15].

<sup>56</sup> The assumption that the orders' dual nature represented a procedural measure was emphasised by the recommendation that the majority of cases dealing with a breach of the orders would still be dealt with by Magistrates' Courts rather than the Crown Court; *ibid*, [19].

<sup>57</sup> *ibid*, [3].

<sup>58</sup> Or indeed whether there could be more than one example of community relationships: when referring to the notion of community, the consultation paper used the pronouns 'a' and 'the' interchangeably.

<sup>59</sup> There is in fact no conclusive definition of the notion of community, from a sociological or legal theoretical perspective, as will be discussed in chapter 4 of this thesis.

<sup>60</sup> This fitted a particular rhetoric surrounding the introduction of the orders, as is discussed below, n 89.



or 'good' neighbours, and focused on the necessity for parenting orders and the reform of youth justice, but the legal and normative implications of the orders' dual nature were largely avoided.<sup>61</sup> Parliament appeared to accept the need for hybrid civil and criminal orders to tackle anti-social behaviour in principle, but did not explore further the ramifications of creating such an instrument in terms of the type of behaviour it would be targeting, or the principles underlying a model of liability to protect communities. General criticism touched on a broad range of measures contained in the CDA,<sup>62</sup> and claims were made condemning the use of a weaker civil standard of evidence in combination with important sanctions.<sup>63</sup> One Liberal Democrat MP also argued that the definitions contained in the CDA were too vague and the judicial discretion too limited.<sup>64</sup> But beyond minor objections that ASBOs represented a 'dangerous mix of the criminal and civil law,'<sup>65</sup> their dual nature was not addressed in either house in relation to the type of liability it would create.<sup>66</sup>

MPs participating in the discussions also used the term 'anti-social behaviour' as if it were well-established shorthand. As we have seen, the discussions surrounding the introduction of the precursors to ASBOs, occurring just a few months prior, likely played a part in giving the impression that anti-social behaviour represented a clearer concept than was in fact the case.<sup>67</sup> Indeed, any claims to the contrary were often met in Parliament with accusations of MPs being ignorant of the struggles of their constituents, for whom this type of behaviour was so familiar it did not need any definition.<sup>68</sup>

The lack of attention paid to both the dual nature of the orders and the definition of anti-social behaviour means that little guidance was provided as to what constitutes the community relationship which the orders were intended to regulate. Superficial

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<sup>61</sup> See for instance Julia Fionda, 'Crime and Disorder Act 1998: New Labour, Old Hat' [1999] Crim LR, Jan 1999, 36.

<sup>62</sup> These included measures relating to youth justice and parenting orders.

<sup>63</sup> HC Deb 8 April 1998, vol 310, col 403 (Sir Alan Beith).

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*, col 436 (Edward Garnier).

<sup>66</sup> The point is also made in Rutherford (n 12).

<sup>67</sup> This impression was perpetrated by the government's refusal to adopt a precise definition of the concept of anti-social behaviour, see below text to n 144.

<sup>68</sup> 'those who suffer from anti-social behaviour do not need to have it defined; they know what it is and experience it daily,' HL Deb 16 December 1997, vol 584, col 550 (Lord Watson); for more examples of these accusations see Rutherford (n 12), 48-50.

analysis was compounded by the lack of definition of other key concepts in the legislation. The following section will explore the ways that political rhetoric has obscured the wider relevance of community relationships in the context of ASBOs.

## **2. ASBOs' dual nature and the 'gap' narrative**

The principal political argument in favour of ASBOs' essentially boiled down to the idea of a 'gap' between the civil and criminal systems where certain persistent and undesirable behaviour fell and could not be legally punished. Like many of the underlying terms and rationale in the CDA, this gap was never defined precisely enough to give a principled basis for the dual nature of ASBOs.<sup>69</sup> Nevertheless, if one has regard to New Labour's approach to individual responsibility and its take on communitarianism, the discussions from which this concept of the gap emerged can help to illuminate the community relationships ASBOs were intended to regulate.

### ***a) Creating the suggestion of a gap***

From *A Quiet Life* to the parliamentary debates surrounding the Crime and Disorder Bill, the main argument for ASBOs was based on the idea of a gap between civil and criminal liability which required a new instrument. The consultation preceding the Bill and the CDA spoke of a 'serious gap' in the government's ability to deliver justice to victims of anti-social behaviour, and called for the creation of dual orders as 'new, effective weapons' to tackle it.<sup>70</sup>

Using this gap as justification for ASBOs meant the behaviour targeted was defined in relation to the failures of civil and criminal liability, rather than outlining what kind of interests they were designed to protect, and what type of harm they sought to prevent against. The distinctions drawn between ASBOs and civil and criminal liability to highlight the inadequacies of each system do, however, provide a

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<sup>69</sup> In fact, it has been argued that the reference to the concept of justice gap itself suggests 'a subtle shift in the meaning of the concept,' moving from a reference to growing evidence of inequality and social exclusion, to its relationship with the lack of social justice and, finally, a 'more specific question of justice system performance,' according to Peter Squires, 'New Labour and the Politics of Anti-Social Behaviour' (2006) 26 (1) Critical Social Policy 144, 146.

<sup>70</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [1] - [3].

valuable insight into ASBOs' intended nature, and their focus on the harm caused to specific communities.

The guidance relating to the CDA made it clear that 'the process [of community safety orders] [was] not suitable for private disputes between neighbours' as these would usually be civil matters.<sup>71</sup> The civil nature of such disputes was a reflection of the ultimately private nature of civil law, as discussed in the previous chapter. ASBOs were specifically considered to be an inappropriate instrument to target private disputes between families in neighbourhoods. Rather, they were designed to deal with behaviour that was deemed harmful to a wider community.<sup>72</sup> They were therefore meant to target behaviour which went beyond specific or private neighbourhood interactions, and extend the scope of liability beyond civil law.

By contrast, the distinction made between ASBOs and the criminal law in policy documents is not formulated in substantive terms, but focuses on the procedural drawbacks of using criminal liability. ASBOs were deemed necessary to deal with behaviour which 'for one reason or another, cannot be proven to the criminal standard, or where criminal proceedings are not appropriate.'<sup>73</sup> The continuous and repetitive nature of the behaviour, compounded by the inability to use evidence from any witnesses other than the victim, was therefore identified as the main obstacle to the application of the criminal standard of liability. Witness intimidation was also considered a major problem in the prosecution of this anti-social behaviour, because of its nature and local characteristic.<sup>74</sup>

ASBOs were therefore presented as a remedy to the side-effects of specific procedural safeguards in criminal law, in particular the exclusive reliance on direct evidence. Stemming from the desire to protect individual defendants in criminal trials, these safeguards were considered to lead to 'failure' when tackling behaviour which was harmful to a specific community in a more localised context. From that point of view, excluding hearsay evidence according to the rules of criminal law created a situation in which liability could not be imposed and the community relationship could not be adequately regulated. Introducing dual civil and criminal orders was therefore

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<sup>71</sup> Home Office, 'CDA: Guidance' (n 7), [2.6].

<sup>72</sup> *ibid*, [3.2] (emphasis in the original document).

<sup>73</sup> *ibid*, [2.6].

<sup>74</sup> As discussed and presented in 'A Quiet Life' (n 1).

considered necessary to allow for hearsay evidence in the initial stages, even while maintaining an ultimate criminal outcome if the order was breached.<sup>75</sup>

### ***b) Beyond the 'gap' narrative***

The 'gap' argument provided a simple and efficient message to explain the need for dual orders, but its simplicity could not convey the deeper normative implications and principled justification for their introduction. By relying solely on the practical consequences of the combination of civil and criminal elements, advocates of ASBOs did not explicitly engage with the ways in which ASBOs might represent a principled legal answer to a specific social issue.<sup>76</sup> Nevertheless, the gap narrative also reveals a deeper ideological and ethical discourse of New Labour at the time. The principal concern of the party while in opposition was explicitly to position itself as a new alternative, and to ensure that 'in each area of policy a new and distinctive approach has been mapped out, one that differs both from the solutions of the old left and those of the Conservative right'.<sup>77</sup> Presenting ASBOs as a remedy to the failures of the existing justice system fit squarely into New Labour's electoral ambitions.

On law and order policies, New Labour aimed to introduce a new, tougher approach to crime, one which broke away from traditional party lines and enabled the party to challenge the government in an area that was considered a traditional conservative stronghold.<sup>78</sup> The CDA and ASBOs played important roles in that politically strategic repositioning: not only was the CDA the first Bill introduced upon New Labour's accession to power, it was and is also a good reflection of the party's new approach to policy making, which arguably brought it from opposition to government. In this context, the 'justice gap' which ASBOs were supposed to bridge might be seen as an essentially symbolic sound-bite, playing off the fear of crime

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<sup>75</sup> The use of hearsay evidence in the civil part of ASBOs is discussed in more details below, see text to n 106.

<sup>76</sup> This thesis argues that the two are ultimately related, and that a principled theoretical justification can in fact be uncovered, as will be discussed in chapters 4 and 5.

<sup>77</sup> Labour Party, 'New Labour Because Britain Deserves Better' (Manifesto, 1997) <<http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>> (accessed on 24 April 2014).

<sup>78</sup> For more details on New Labour's use of law and order policy in the run up to the 1997 elections, see David Downes and Rod Morgan, 'No turning back: the politics of law and order into the millennium' in Mike Maguire, Rod Morgan, and Robert Reiner, (eds.) *The Oxford Handbook of Criminology* (OUP 2006) 201-240.

within local communities for political gain, rather than developing a clear rationale for their creation.<sup>79</sup> With the notion of a justice gap to be filled, New Labour's discourse surrounding the adoption of the CDA helped to place a threat at the heart of every community, and promised straightforward solutions to tackle these issues.<sup>80</sup>

Yet it may also reflect a deeper ideological current in New Labour's policies. Communitarianism and the concept of community as a foundation for both individual rights and responsibilities played a significant part in New Labour's political discourse. Although Blair's attachment to the concept of community is said to have originated in his study of a little known Scottish philosopher John MacMurray, the philosophy of communitarianism eventually found its place 'at the heart of New Labour's post-Thatcherite politics.'<sup>81</sup>

Behind Blair's famous call to be 'tough on crime, and tough on the causes of crime,'<sup>82</sup> New Labour's law and order policies were heavily influenced by the concept of community as a moral entity. According to Blair, 'the importance of the notion of community is that it defines the relationship not only between individuals but between people and the society in which they live, one that is based on obligations as well as entitlements.'<sup>83</sup> The duality of rights and responsibilities at the heart of New Labour's law and order policies was positioned as an ethical construct, according to which 'community' came to be understood within a moral context in which responsibilities are necessarily attached to rights,<sup>84</sup> at both a national and a more local level.<sup>85</sup>

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<sup>79</sup> The fact that New Labour understood well 'the power and importance of symbolic politics, of using a phrase or an action to convey something more powerful and significant' lends weight to this interpretation, as was argued by Newburn and Jones in relation to the influence of the idea of 'zero-tolerance policing' and law and order policy in general, Tim Newburn and Trevor Jones 'The Convergence of US and UK crime Control Policy: Exploring Substance and Process' in Tim Newburn and Richard Sparks (eds), *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control* (Willan Publishing 2004), 133.

<sup>80</sup> As one critical commentator put it, the orders contain an inherent 'ambivalence or sleight of hand', and were 'intended to sail as close to the wind as possible,' Andrew Ashworth, 'Social Control and 'Anti-Social Behaviour': The Subversion of Human Rights' (2004) 120 LQR 263.

<sup>81</sup> Stephen Driver and Luke Martell, *New Labour: Politics after Thatcherism* (Polity Press 1998), 27-29; Tony Blair's attraction to communitarianism is also discussed in John Rentoul, *Tony Blair*, (London: Warner Books, 1995 – revised 1996) 479, although the link between Blair's policies and the philosophy of MacMurray has also been questioned – Sarah Hale, 'Professor Macmurray and Mr. Blair: The Strange Case of the Communitarian Guru that Never Was' (2002) 73(2) Political Quarterly 191.

<sup>82</sup> Nick Clarke, interview with Tony Blair, 'The World This Weekend' (10 January 1993), as referred to in Rutherford (n 12); some claim the phrase was in fact "invented by Brown in 1993", see Norman Fairclough, *New Labour, New Language* (Routledge 2000) 41.

<sup>83</sup> Speech in Wellingborough, 19 February 1993.

<sup>84</sup> Fairclough (n 82), 38.

These calls for toughness and the imposition of sanctions in relation to crime can be seen as a reflection of community relationships, projecting the need to protect the 'good' community while punishing the 'bad' transgressor or criminal. While in opposition and in their early years in power, this moral value of community shaped New Labour's vision of communitarianism,<sup>86</sup> and heavily influenced its policies on law and order<sup>87</sup>

Still, whether ASBOs represent mere political rhetoric or are symptomatic of a wider ideology, the need for a clear justification for the dual nature of the orders remains. Presenting ASBOs as simply 'filling a gap' merely suggests that civil and criminal law are being used in juxtaposition to solve perceived failures of the existing system. But as introduced in the previous chapter, the combination of civil and criminal elements in ASBOs can be seen as a more concerted effort to regulate a particular type of behaviour, situated somewhere between private relationships and the broader relationship between an individual and society. This 'community' relationship represents a middle ground, between civil and criminal extremes.

In the second half of this chapter, we will explore how these civil and criminal elements interact to create a unique legal instrument, targeting precisely that middle ground.

## **II. The Concept of Community in ASBO legislation**

The provisions in the CDA fail to paint a clear picture of where exactly the 'new' relationship of community at the heart of ASBOs lies. As with the definition, or lack thereof, of anti-social behaviour, the ambiguity was partly intentional, part of a concerted effort to allow for a broad level of discretion in the application of ASBOs. Flexibility in the orders allows for a wide range of considerations to be taken into account, and suggests a concept of community which can be held to represent

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<sup>85</sup> The communitarian movement applies the notion of community to a number of social relationships, ranging from families to local communities; see ch 4, text at n 81.

<sup>86</sup> Driver and Martell refer to the use of 'moral' as opposed to 'socio-economic' communitarianism: Stephen Driver and Luke Martell, 'New Labour's Communitarianisms' (2007) 52 *Critical Social Policy*, 27-46.

<sup>87</sup> This approach ultimately led to 'legislative solutions to what [was] presented as ethical threats,' Driver and Martell (n 81), 119.

different types of social groups. Inevitably, however, its lack of definition of what makes a community also introduces a degree of uncertainty in the application of ASBOs, and raises issues regarding the way ASBOs can be used to impose liability.

### **A. The Procedural and Substantive Nature of ASBOs: Outlining the Concept of Community**

The use of civil and criminal law and procedure within ASBOs goes beyond purely practical advantages, and speaks to the type of community relationships the orders seek to regulate. In forming a view of the underlying rationale of ASBOs, one needs to look not only at the substantive provisions of the CDA, but also at the procedures for their creation and enforcement. These provide evidence that communities, rather than individuals, are what these orders are intended to protect, and present characteristics indicative of a particular concept of community.

The role of local authorities in applying for ASBOs places a clear emphasis on the local nature of that relationship, which extends to the manner in which the hearsay rule operates. The admission of hearsay evidence reflects concerns that, in a close community context, individuals are often dissuaded from testifying. It allows this evidence to be gathered by local authority employees, and then related, in the absence of the original witness, at either stage of the ASBO proceedings.

In addition, the importance of the community relationship is also illustrated by the way individual liability is framed in the orders. The creation of a discrete criminal offence and the absence of a subjective *mens rea* requirement suggest a vision of individual guilt which focuses on the way an individual relates to others directly around him, as opposed to his subjective state of mind. The creation in 2002 of orders on conviction (discussed below) affirms how the community relationship ASBOs seek to regulate is different from criminal liability, imposing liability for the same behaviour but focusing on a narrower scope of social relationships.

## **1. The concept of community in the initial civil order**

As discussed, the consultation and discussion relating to the Crime and Disorder Bill focused principally on the civil nature of ASBOs and described it as a ‘civil injunction’. When considering community relationships in the context of ASBOs, two key elements of this initial civil stage are particularly relevant: the role given to local authorities who are granted the power—and the duty—to apply for an order, and the procedural and evidentiary advantages attached to a civil order. The former highlights the orders’ concern for a new community-focused approach to crime and disorder, and the latter is designed to protect those affected by anti-social behaviour, and ensure that they do not have to testify against those responsible for it, especially if they live in the same area or interact socially.

### ***a) Relevant authorities: local characteristic of the orders***

The rules for applying for an ASBO place responsibility on local and police authorities or related bodies. The CDA states that an order will be made upon application by a ‘relevant authority,’ which in the initial provision included the council for a local government area and the chief officer of police of any police force.<sup>88</sup> Local authorities and police forces still represent over 90% of all ASBO applicants,<sup>89</sup> despite later additions to the list of bodies which could apply for them.<sup>90</sup> The role of those authorities is defined by what is seen as the need to intervene to protect members of the community from further anti-social acts, as opposed to settling private disputes between neighbouring families.<sup>91</sup>

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<sup>88</sup> Section 1(1), CDA 1998.

<sup>89</sup> Official statistics gathered by the Home Office and Ministry and Justice, ‘Anti-social behaviour order statistics: England and Wales 2013’, published 18 September 2014, available at <<https://www.gov.uk/government/statistics/anti-social-behaviour-order-statistics-england-and-wales-2013>> accessed 13 January 2015.

<sup>90</sup> A new subsection 1A was added in 2002, listing ‘relevant authorities’ and adding the chief constable of the British Transport Police Force as well as any person registered as a social landlord: PRA 2002, s 61(4); subsequent amendments changed the wording slightly and included other types of institutions providing social housing (Anti-Social Behaviour Act 2003 – ASBA 2003, s 85 and the Housing and Registration Act 2008 (Consequential Provisions) Order 2010/866).

<sup>91</sup> Home Office, ‘CDA: Guidance’ (n 7), para 3.2.



This approach to the role of local authorities reflects the policy concept of 'community safety,' developed as an alternative to crime prevention in the 1990s. The Morgan report, published in 1991,<sup>92</sup> was commissioned to look into the implementation of a previous circular which aimed to make crime prevention a more community-oriented endeavour.<sup>93</sup> The report made two principal recommendations. It recommended that the concept of crime prevention should be replaced by that of 'community safety' in an attempt to encourage community involvement and widen the ambit of the authorities' actions. It also recommended an institutional change, in which the implementation of community safety would be accomplished by a multitude of local agencies including police and probation officers as well as other local authorities and volunteer organisations.<sup>94</sup>

Community safety is broader than the more traditional concept of crime, and comprises the wider physical and social impact of crime, including any anxieties it may cause.<sup>95</sup> Although from this perspective the relevance of community safety to ASBOs seems clear, the concept has also been criticised for its objectification and oversimplification of the concept of community in New Labour policies.<sup>96</sup> In addition to introducing ASBOs, the CDA also establishes a duty for local authorities to formulate and implement a strategy against crime and disorder, including anti-social behaviour, in their area.<sup>97</sup> These provisions aimed to create Crime and Disorder Reduction

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<sup>92</sup> Home Office, 'Safer Communities', (Report of the Home Office Standing Committee on Crime Prevention – chair, James Morgan, 2001), para 3.9.

<sup>93</sup> Home Office, Interdepartmental Circular 8/84.

<sup>94</sup> Although the report was rejected by the Conservative government at the time, it has been instrumental in introducing the concept of Community Safety which has informed much of New Labour's crime prevention policies but also influenced the policy statements of many Councils before New Labour even came to power See Downes and Morgan (n 78) and John Tierney, *Criminology – Theory and Context* (Pearson Longman 2006).

<sup>95</sup> Adam Crawford, *Crime Prevention and Community Safety: Politics, Policies and Practices* (Addison – Wesley Longman 1998), 9; this can also be related to the loss of dominion caused by criminal behaviour, as identified in John Braithwaite and Phillip Pettit, *Not Just Deserts* (Clarendon Press 1990), chap 5, 64; see ch 4 (n 107) for more details.

<sup>96</sup> Squires argues that the concept of community safety as it has been applied to ASBOs at the local level has created 'contradictions between social inclusion policy objectives and the stigma and exclusion associated with tougher enforcement actions,' effectively shifting the concept from a holistic community oriented to an enforcement focused approach to crime and disorder, Squires (n 69), 149. Crawford also argues that under New Labour, 'social and spatial polarisation' has undermined the notion of community as a force of social cohesion, helping in the creation of a fragmented, economically divided and socially stretched entity, Adam Crawford 'Community Safety and the Quest for Security: Holding Back the Dynamics of Social Exclusion' (1998) 19(3/4) Policy Studies 237.

<sup>97</sup> CDA 1998, ss 5-7.

Partnerships, which include various authorities involved in criminal justice, such as local, police, fire and rescue and health authorities and probation services.<sup>98</sup> The duties of the partnerships include the formulation and implementation of a strategy to address anti-social behaviour and other adverse behaviour as part of general crime and disorder.<sup>99</sup>

According to these provisions, the duty to devise such a strategy explicitly operates at a local rather than national level. In this regard, ASBOs can be seen as emerging from a broader agenda aimed at increasing 'community safety' through the use of alternatives to the traditional criminal justice tools of enforcement. Through the use of ASBOs, police and local authorities have a duty to regulate and preserve important community relationships, and often do so in tandem.<sup>100</sup>

As we will see in the following section, this empowerment of local authorities works in tandem with the evidentiary rules for ASBO applications to reinforce the construct of the community relationship that ASBOs were intended to regulate.

### ***b) Shifting the evidentiary burden: hearsay and professional witnesses***

In the Consultation Paper preceding the adoption of the CDA, the Home Office presented ASBOs' nature as civil, outlining the fact that the civil standard of proof would apply when deciding whether or not to grant an order.<sup>101</sup> Although this assumption was eventually denied by the courts,<sup>102</sup> it shows one of the key practical values initially attached to the use of civil proceedings: the availability of hearsay evidence and the use of professional witnesses.<sup>103</sup>

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<sup>98</sup> They are also now referred to as Community Safety Partnerships.

<sup>99</sup> CDA 1998, s 6(1)(a), as introduced by the Police and Justice Act 2006, Sch 9, para 3.

<sup>100</sup> Localised studies of anti-social behaviour powers and regulation show the importance of police and local authorities working together, often in specific taskforces, as shown in studies conducted in East Brighton: Laurence Koffman, 'The Use of Anti-Social Behaviour Orders: An Empirical Study of a New Deal for Communities Area', [2006] Crim LR 593, and in the Midlands: Sarah Hodgkinson and Nick Tilley, 'Policing anti-social behaviour: constraints, dilemmas and opportunities' (2007) 46(4) Howard J of Crim Justice 385; however, Burney has also criticised the disproportionate power and influence police forces often enjoy in those partnerships, Elizabeth Burney, *Making People Behave* (2<sup>nd</sup> ed, Willan Publishing 2009), 166-9.

<sup>101</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [12].

<sup>102</sup> *McCann* [2003] UKHL 39, see ch 1 text to n 16.

<sup>103</sup> Civil Evidence Act 1995, ss 1-4.

Civil proceedings were seen as a way to ensure that the ‘heavy burden [of testifying] will not be placed on local people.’<sup>104</sup> Although the social context in which ASBOs are applied is not restricted to a particular housing estate or neighbourhood (as was the case in relation to CSOs) the need to protect potential witnesses was still considered sufficient to justify the use of hearsay evidence.<sup>105</sup>

In the case of the Finnie brothers, outlined in *A Quiet Life*, neither brother actually resided in the area in which their behaviour was affecting others. But the way in which they behaved was perceived to be pressuring people into not testifying. The nature of the interaction in question and its impact on others, rather than pure local proximity, seemed to justify the need for hearsay evidence to be admissible.<sup>106</sup> Beyond *A Quiet Life*, the Consultation Paper and the guidance accompanying the CDA also outlined how the use of the expression ‘likely to cause’ in the definition of ‘anti-social behaviour’<sup>107</sup> was intended to allow for someone other than the victim, and more specifically for professional witnesses, to provide evidence. The civil nature of the injunction would enable professional witnesses such as local authority employees, policemen and women, social workers, etc, to provide conclusive evidence of the behaviour ‘from their own direct observations....’<sup>108</sup>

The initial civil nature of the orders was therefore meant to do more than just bypass criminal procedural safeguards. It provided a means to ensure that the context of the behaviour in question was accurately represented in court, despite the possible intimidations of victims and witnesses. This perspective, which emerges from the literature and arguments surrounding the introduction of ASBOs is also reflected in the assumption that the kind of behaviour which would give rise to an ASBO would generally be directly observable by local police forces and other professional

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<sup>104</sup> HC Deb 8 April 1998, vol 310, col 414 (Hazel Blears).

<sup>105</sup> Although the orders were not explicitly related to their application on housing estates in the CDA 1998, the relationship between anti-social behaviour as it is represented in ASBOs and disorder on council estates remained a complex one in practice; it was described as a ‘toxic mix’ similar to disorder in prison environments, the origin of which was not explicitly addressed or understood, Squires (n 71), 155.

<sup>106</sup> This point about the nature of the behaviour targeted is also discussed below, in relation to the concept of anti-social behaviour itself.

<sup>107</sup> CDA 1998, s 1(1).

<sup>108</sup> See Home Office, ‘CDA: guidance’ (n 7), paras 4.9 and 3.1; even if evidence was not obtained directly, the rules relating to hearsay evidence would allow it to be used in the application for an order.

witnesses, further highlighting its public nature and the relevance of the community context.

## **2. The criminal offence: adding teeth to the ASBO**

Once the initial civil order is granted in the form of the ASBO, its breach will be punished by a criminal offence as set out in section 1(10) of the CDA. The criminal offence is a specific one and is not related to the general offence of ‘contempt of court’ traditionally attached to the breach of civil injunctions.<sup>109</sup> This distinction reflects the different relationships each instrument seeks to protect and regulate, and reinforces ASBOs’ focus on community relationships.<sup>110</sup> The introduction in 2002 of CrASBOs—orders which can be granted on conviction for a criminal offence—also codified that a single course of behaviour could lead to both criminal liability and liability through the use of ASBOs, and confirmed their focus on protecting community relationships, in contrast to the criminal law’s concern for society in general.

### ***a) Creation of a distinct criminal offence***

The use of criminal punishment in relation to the breach of a civil injunction is not in itself a new development in English law. As outlined in the first chapter of this thesis, civil contempt of court relies on a similar mechanism, which creates a criminal offence for breaching a civil injunction. Still, this use of the criminal law to bolster a civil injunction cannot accurately be equated to the creation of a dual civil and criminal order such as the ASBO, either from a formal or a substantive perspective. In particular, the use of criminal sanctions in the context of contempt of court is explicitly justified to sanction the individual for having violated the authority of the court in not respecting the terms of the injunction. By contrast, as we have seen, the criminal offence of breaching an ASBO can be seen as a means to regulate the relationship between an individual and a particular community.

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<sup>109</sup> As was presented in chapter 1, civil contempt criminalises the offence caused against the Crown by the non-observance of an injunction rather than the specific harm caused by the violation itself.

<sup>110</sup> Despite some claims to their similarity, ASBOs can also be distinguished substantively from civil contempt on a number of fronts, as was argued in chapter 1, see in particular text to n 104.

This distinction between civil contempt and ASBOs appears to have been appreciated in the legislative process leading up to the creation of ASBOs. The Consultation Paper made clear that relying on contempt of court as a means to enforce the orders was considered,<sup>111</sup> even though the creation of a distinct criminal offence was only indirectly addressed in the policy documents. Nevertheless, general discussions and certain key provisions do shine light on this decision, as well as on the way the criminal offence furthers the goal of ASBOs. The first mention of the creation of a distinct criminal offence came in the Consultation Paper when discussing whether applications for an ASBO should be heard by the County Court (by virtue of its civil nature), or in front of the Magistrates' Court. Because ASBOs 'will be enforced through criminal proceedings,' the Consultation Paper noted that the County Court would not be able to enforce its own orders, unless 'provision was made for a parallel power of enforcement through proceeding for contempt of court.'<sup>112</sup> Despite noting some advantages to using the County Court, in particular its speedier disposition than criminal proceedings in the Magistrates' Court, the latter was found to be the appropriate jurisdiction, reinforcing the distinction between ASBOs and contempt of court.<sup>113</sup>

This distinction was also reinforced by the emphasis placed on the gravity of the offence of breaching an ASBO, generally considered more significant than civil contempt. Guidance related to the CDA states that the 'breach of an order ... should always be treated seriously' and political discourse surrounding the introduction of ASBOs echoed this.<sup>114</sup> The offence created in section 1(10) is triable 'either way', and on indictment, the maximum penalty is a five year custodial sentence, compared to civil contempt's maximum sentence of two years.<sup>115</sup> The possibility of a five year sentence is in itself a sign of how serious the breach of an ASBO can be, putting it on a

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<sup>111</sup> The consultation notes that the "breach of the terms of the order [...] would be a criminal offence *unless, after consultation, a parallel power of enforcement through contempt of court is accepted,*" Home Office, 'CSO: A Consultation Paper' (n 53) [20] (emphasis added).

<sup>112</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [19].

<sup>113</sup> This has also been the subject of criticism, arguing this use of criminal courts was seen as a 'cheap and quick' legal method, Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 255.

<sup>114</sup> Home Office, 'CDA: Guidance' (n 7), para 8.1.

<sup>115</sup> CDA 1998, 1(10)(b); in addition to the high maximum penalty attached to the offence, section 1(11) also provides that no conditional discharge can be made upon conviction.

par with offences involving violence, physical assault,<sup>116</sup> and some sexual offences.<sup>117</sup> Even if the act which constitutes the breach causes no inherent alarm, harassment or distress, its serious character was emphasised by the Home Office in the Consultation Paper.<sup>118</sup> In practice, it is probable the five year sentence was also chosen because it represented the threshold for making the offence arrestable under the Police and Criminal Evidence Act 1984, as was indeed mentioned in documents relating to the introduction of the CDA.<sup>119</sup> The notion of an ‘arrestable offence’ was repealed in 2006,<sup>120</sup> but the severity of this five year maximum penalty attached to the breach of an ASBO remains.<sup>121</sup>

The impact of the length of the sentence is reinforced by the offence’s lack of a *mens rea* requirement. Section 1(10) of the CDA calls for the lack of a ‘reasonable excuse’ when considering liability for breaching terms of a particular order.<sup>122</sup> The provision doesn’t impose any other *mens rea* requirement, eschewing all but the lightest consideration of a guilty mind on the part of the defendant.<sup>123</sup> Contrasted with traditional criminal offences, which are more concerned with subjective individual guilt when imposing liability, these terms—or lack of them—can make the consequences of potentially benign behaviour much more serious, if it violates the terms of an order.

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<sup>116</sup> Violent disorder according to Public Order Act 1986, s 1; Assault Occasioning Actual Bodily Harm according to the Offences Against the Persons Act 1861, s 47.

<sup>117</sup> Offences relating to a position of trust: Sexual Offences Act 2003, ss 16-19.

<sup>118</sup> Home Office, ‘CSO: A Consultation Paper’ (n 53), [21].

<sup>119</sup> Criminal Evidence Act, s 24(1)(b); the consultation mentions explicitly that ‘by virtue of this maximum penalty the offence would be arrestable,’ Home Office, ‘CSO: A Consultation Paper’ (n 53), [21]; and the guidance states that ‘breach of an order is an arrestable offence,’ Home Office, ‘CDA: Guidance’ (n 7), para 8.2.

<sup>120</sup> Serious Organised Crime and Police Act 2005, came into force 1 January 2006.

<sup>121</sup> In practice, the average custodial sentence for this offence is just over 5 months, although the high rate of breach (58% of ASBOs, 75% of which are breached more than once) and the imposition of a custodial sentence for more than 50% of cases of breach make this figure more significant and potentially problematic, as argued by Burney in *Making People Behave* (n 100), pp 105-6 and Sarah Hodgkinson and Nick Tilley, ‘Tackling anti-social behaviour : Lessons from New Labour for the Coalition Government’ (2011) 11(4) *Criminology and Criminal Justice* 283, 290.

<sup>122</sup> This provision also mirrors section 1(5), which states that acts which can be proved to be reasonable will be disregarded when considering the need for an ASBO.

<sup>123</sup> ASBOs can be distinguished from other offences which impose a reasonable standard of *mens rea*, for example rape, which requires an intentional act in addition to the defendant’s absence of concern for the existence of consent; eg Sexual Offences Act 2003, s 1; the mental element in ASBOs is discussed further in ch 3, s IIA2.

***b) CrASBOs: confirming the alternative nature of liability***

The creation of ASBOs on conviction (CrASBOs) in 2002 provides further insight into the nature of ASBOs and the concept of community in relation to individual liability. It is generally understood that the introduction of CrASBOs was motivated by the government's wish to increase the number of orders being granted.<sup>124</sup> A sharp rise in the number of orders post-2002 did in fact occur, and CrASBOs have eventually proved more popular than traditional ASBOs: they now represent around 60% of all ASBOs issued since 2003.<sup>125</sup>

From a theoretical perspective, by explicitly allowing for an order to be granted on conviction for another criminal offence, the reform clearly shows that the hybrid mechanism represented by ASBOs is meant to function alongside pure criminal law when the behaviour targeted is both anti-social and criminal. It effectively recognises that ASBOs represent a different mode of imposing liability for a particular course of behaviour, distinct from the criminal liability that could be or would already have been imposed. It also points towards the different nature of the community relationship the dual orders are seeking to regulate, distinguishing it from criminal liability and its focus on individual behaviour in a national context.<sup>126</sup>

The idea of an order being issued on conviction for anti-social behaviour was first put forward in the Consultation Paper which preceded the introduction of the CDA in 1998, but it took until 2002 for the plans to become reality.<sup>127</sup> Sections 61-65 of the

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<sup>124</sup> Despite their introduction with great fanfare, the use of ASBOs was slow to start and less than 500 were issued every year for the first couple of years after the CDA 1998. This was considered low, especially in comparison with the government's expectations; the PRA 2002 introduced a number of amendments to the CDA 1998, and in particular allowed the courts to grant an ASBO on conviction for a criminal offence; Squires refers to the use of 'asbo ambassadors' to increase the use of the orders in the first few years preceding the 2002 reform, Squires (n 71); see also Elizabeth Burney, 'Talking Tough, Acting Coy: What Happened to the Anti-Social Behaviour Order' (2002) 41 (5) *Howard J of Crim Justice* 469.

<sup>125</sup> Official statistics, Home Office (n 89).

<sup>126</sup> The theoretical principles informing the notion of individual responsibility in the context of criminal liability are discussed more fully below in chapter 4.

<sup>127</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [26]-[28]; prior to the reform, a report conducted a survey on the use of ASBOs and concluded that while there was a wide discrepancy of the use of the orders between the different local areas, there was an overall positive reaction to their introduction. It also highlighted some issues surround the orders' application in relation to the speediness and consistency of local processed and made a series of recommendations relating to their reform. Although the Police Reform Bill was introduced soon after the report, most of its recommendations were not included in the reform: Siobhan Campbell, 'A review of ASBOs' (Home Office Research Study 236, 2002).

Police Reform Act 2002 amended the relevant provisions of the CDA in a number of ways, mostly by amending the application process.<sup>128</sup> But the most significant amendment, both in substance and in terms of its eventual impact, was the creation of ASBOs on conviction in criminal proceedings. Section 64 of the Police Reform Act 2002 inserted section CDA, stating that:

- (1) This section applies where a person (the “offender”) is convicted of a relevant offence.
- (2) If the court considers—
  - (a) that the offender has acted, at any time since the commencement date, in an anti-social manner, that is to say in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself, and
  - (b) that an order under this section is necessary to protect persons in any place in England and Wales from further anti-social acts by him, it may make an order which prohibits the offender from doing anything described in the order.

CrASBOs are essentially similar to ASBOs on application in their nature and substance: the decision to make a CrASBOs will rest on exactly the same conditions as a ‘normal’ ASBO, and the terms which may be included are the same as well. The differences are the initial stage and timing. CrASBOs can be granted if a defendant has been convicted of a ‘relevant offence’<sup>129</sup> but an order ‘shall not be made except ... in addition to a sentence imposed ... for the relevant offence, or in addition to an order discharging it conditionally.’<sup>130</sup> As with ordinary ASBOs, the decision to make an order rests with the court,<sup>131</sup> but the request can only be made by the prosecutor in the specific case.<sup>132</sup> Although a post-conviction ASBO can be imposed only on conviction or conditional discharge for the offence charged, the explanatory notes relating to the

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<sup>128</sup> Significant amendments concerned the addition of social landlords and the British Transport Police to the list of ‘relevant authorities’ which could apply for an order, and extended the geographical reach of the relevant authorities when applying for an order to the whole of England and Wales; PRA 2002, s 61(4).

<sup>129</sup> “‘relevant offence’ means an offence committed after the coming into force of section 64 of the Police Reform Act”, CDA 1998, s 1C(10).

<sup>130</sup> CDA 1998, s 1C(4).

<sup>131</sup> The court may do so if the prosecutor makes such a request or if ‘the court thinks it appropriate to do so,’ CDA 1998, s 1C(3), as amended by the ASBA 2003.

<sup>132</sup> The procedural rules when making an application under section 1C are defined by the Criminal Procedure Rules which set out a number of requirements for the application. According to rule 50.3, the prosecutor must serve a “notice of intention to apply for such an order” on the court officer, the defendant and any other person “on whom the order would be likely to have a significant adverse effect”; the notice must contain a summary of the relevant facts, identify the evidence on which the prosecutor relies in support and specify the order sought.



CDA specify that such an order does not represent a penalty for the offence in question.<sup>133</sup> In addition, if the sentence resulting from the conviction is a custodial one, the court making the order can suspend its application until the end of the sentence in question.<sup>134</sup>

The term 'CrASBO' may be an ear-catching nickname, but it is somewhat of a misnomer. ASBOs on conviction are not criminal in the sense that they are necessarily imposed for criminal behaviour. Although they will be imposed in the course of criminal proceedings, they are regulated by the same rules and definitions as ASBOs on application. Their dual structure functions in precisely the same way, and the court will make the same assessment as that required for an order on application, based on the same legal concept of 'anti-social behaviour'.<sup>135</sup> The 'criminal' nature of the post-conviction orders lies solely in the manner in which they are imposed, and remains by association rather than by nature.

In practice, the anti-social behaviour targeted by the order will often overlap with the criminal behaviour leading to the concurrent conviction. However, the distinction explicitly made between the two in procedural terms is significant when considering the nature of ASBOs and the social relationship each type of liability is attempting to regulate.<sup>136</sup> The fact that an order could be imposed for precisely the same behaviour as that which might lead to a criminal conviction, as section 1C allows, has been interpreted by some as a sign of the government attempting to exploit the procedural and practical advantages of ASBOs as a quick and potentially easier route to the criminalisation of both non-criminal and criminal behaviour, a vision conceivably supported by their success in implementation and practice.<sup>137</sup>

While ASBOs do provide the possibility of avoiding the more cumbersome procedure of the criminal law in certain cases, this is not so much an intrinsic

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<sup>133</sup> CDA 1998, s 1C(3).

<sup>134</sup> CDA 1998, s 1C(5).

<sup>135</sup> The procedural requirements regarding ASBOs on application and conviction, are discussed in more details below, ch 3, text to n 72.

<sup>136</sup> Not only does a post-conviction order not count as penalty and can be suspended until the end of any custodial sentence, but subsection 1(C)(3) was amended by the ASBA 2003 to specify that evidence which would not be admissible for the criminal proceedings could be admissible in the ASBO proceedings.

<sup>137</sup> Burney in particular refers to the use of CrASBOs as the mere introduction of an 'add-on punishment,' in Burney 'Talking tough, acting coy' (n 124); this criticism has also been exacerbated by the rise in the number of orders granted after the introduction of the PRA 2002.

characteristic as a possible misuse of this specific legal instrument.<sup>138</sup> With regard to liability, the overlap between anti-social and criminal behaviour highlights the fact that the use of a dual order is meant to function more as an alternative to criminal liability than a replacement. And although the creation of CrASBOs acknowledges and in some way reinforces the importance of the criminal element of ASBOs beyond the specific criminal offence of breaching an order, their combination of civil and criminal law underscores their focus on the protection of community interests. In the same way that an individual can be separately held liable in civil and criminal law for the same act, the creation of ASBOs on conviction acknowledges the idea that a particular type of behaviour may call for the imposition of criminal liability as well as that of an ASBO, and that each legal instrument will be imposed to regulate different type of behaviour and relationships.

This examination of the legal provisions defining the orders' civil and criminal nature makes it possible to argue that the idea of protecting communities played a significant part in the creation of ASBOs. However, the nature of community relationships and the justification for their protection remains elusive. The following section will explore how this lack of definition is not a result of poor drafting and bad policy, but rather it represents a concerted effort to embrace flexibility in the orders' definition.

## **B. Anti-Social Behaviour and the Community in ASBOs**

The elusive character of the concept of community that emerges from the dual nature of ASBOs reflects a positive effort to adapt to the circumstances of a particular case. It also raises significant issues of uncertainty and indeterminacy in terms of their application. Ultimately, however, the absence of a clear-cut definition highlights ASBOs' purpose of regulating and protecting specific and varied community relationships, through a case-by-case approach.

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<sup>138</sup> As will be discussed in the following chapter, judicial interpretation of the orders has also introduced more safeguards to prevent this use of the orders.

## **1. Anti-social behaviour in the Crime and Disorder Act 1998**

When drafting the provision defining anti-social behaviour, the government specifically chose to give wide discretion to those applying for, and deciding whether to grant, an order. This means that the type of social interactions which will be regulated by ASBOs is not a closed category, and allows flexibility in terms of what community relationships will be considered.<sup>139</sup> This is compounded by the lack of definition of the concept of anti-social behaviour in the CDA, leaving courts free to expand further the scope of application of the ASBOs.

### ***a) A purposive lack of definition***

The Consultation Paper preceding the CDA outlined very broad examples of conduct which could form the basis of an application for an ASBO. According to the government, it would include conduct which:

- causes harassment to a community;
- amounts to anti-social criminal conduct, or is otherwise anti-social;
- disrupts the peaceful and quiet enjoyment of a neighbourhood by others; or
- intimidates a community or a section of it.<sup>140</sup>

Although the Consultation Paper also stated that the conduct itself would be 'set out' in the statute, the CDA only defines anti-social behaviour as: 'acting in a manner that causes or is likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.'<sup>141</sup>

The term 'anti-social behaviour', although central to the denomination, the general labelling and indeed the political discourse surrounding the introduction of ASBOs, is not actually defined, nor even used, in the legislation which introduces the them. In the guidance issued after the CDA was passed, the Home Office again failed to

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<sup>139</sup> Unless otherwise specified, the term ASBO will from this point onwards be used to refer to both traditional ASBOs on application and post-conviction CrASBOs.

<sup>140</sup> Home Office, 'CSO: A Consultation Paper' (n 53), [9].

<sup>141</sup> Section 1(1)(a) CDA 1998; as government minister at the time Alun Michael explained to the House of Commons, a 'widely drawn legislation with clarity of purpose and with clear expectation placed on those who use it, can be a flexible method,' SC Deb (B) 30 April 1998, col 46; see ch 1, n 13.

provide a more specific definition of ‘anti-social behaviour’, although it attempted to distinguish it from civil disputes and irritating or generally upsetting activities which are not sufficiently serious. The guidance muddies the water further by claiming that an ASBO is ‘in broad terms, ... likely to be relevant where there is behaviour of a criminal nature which causes, or is likely to cause harassment, alarm or distress,’ before giving some general examples of behaviour, including intimidation ranging from threats or violence to ‘unpleasant actions’, persistent racial harassment or homophobic behaviour, or even persistent unruly behaviour by a small group of individuals ‘who may dominate others.’

The statement that the list is not exhaustive but intended as an illustration affirms the definition’s persistent ambiguity, which dates back to the genesis of the ASBOs, and was denounced by commentators at the time.<sup>142</sup> This ambiguity and lack of definition continues to be criticised, leading to accusations of ‘mission creep’ in the way they have been applied.<sup>143</sup> The Consultation Paper also identifies the relevance of a pattern of behaviour occurring over a period time, but essentially relies on the procedural justification for ASBOs, falling short of outlining a clear definition of the required behaviour.

***b) Refining the concept of anti-social behaviour:  
opening up the community thread***

Though ‘anti-social behaviour’ remains undefined in the CDA itself, a concept of anti-social behaviour does emerge from the political and legislative context in which ASBOs were introduced. As outlined in the first part of this chapter, dual civil and criminal orders were originally intended to tackle behaviour which was harmful to a particular neighbourhood or community.

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<sup>142</sup> The lack of definition was part of the general criticism levied against plans to introduce ASBOs: see Andreas von Hirsch and others, ‘Overtaking on the Right’ [1995] NLJ 1501; Andrew Ashworth and others, ‘Neighbouring on the Oppressive’ (1998) 16 (1) Criminal Justice 7, Andrew Ashworth and others, ‘Clause 1: The Hybrid Law from Hell?’ (1998) 31 CJM 25, Andrew Ashworth, ‘In Favour of Community Safety (Editorial)’ (1997) 11 Crim LR 769, and ch 1, text to n 133.

<sup>143</sup> Elizabeth Burney argues that anti-social behaviour has become an ‘all-embracing category’ in Burney ‘Talking Tough, Acting Coy’ (n 124), and Stuart MacDonald explores in more details the various practical applications given to the concept in Stuart MacDonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of Anti-Social Behaviour’ (2006) 69(2) MLR 183.

The examples of anti-social behaviour given in the policy documents which preceded the legislation, despite their wide range, can help illuminate the legal concept of ‘anti-social behaviour’ according to the CDA.<sup>144</sup> The repetitive or chronic character of the behaviour plays an important part in the examples, all of which refer to the ‘persistent’ nature and pattern of the behaviour. This is something which it shares with stalking. In addition, however, the local nature of the behaviour is also significant, with numerous references to the notion of ‘community’ as the victim of the behaviour in question.

In the CDA itself, the only reference to a particular social context defining anti-social behaviour relates to its affecting ‘one or more persons not of the same household’ as the perpetrator.<sup>145</sup> But the behaviour targeted by ASBOs does not necessarily refer to the location of its occurrence. In fact, anti-social behaviour is distinguished from behaviour which may irritate or even upset members of the community (which would be considered mere civil disputes), but relates more specifically to behaviour in which the persistent unruly behaviour is carried out by a small group of individuals ‘who may dominate others.’ In that particular example, the anti-social character of the behaviour is found in the relationship between the perpetrator and those affected by it, and the psychological hold it effectively gives him over them. This is well illustrated in *A Quiet Life* in the case of ‘Family X’, which relied on the impact threatening behaviour had on a mother who was followed to school with her daughter every day, as well as in the case of tenants who were forced to sleep in their living room for fear of being burgled.<sup>146</sup>

The examples provided in *A Quiet Life* and the subsequent policy documents shed some light on the concept of community at the heart of ASBOs’ liability. Characteristics which appear to define a given community range from geographical proximity to an ongoing or feared psychological pressure between perpetrator and those affected by his behaviour. However, this thesis argues that these are not necessarily the defining

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<sup>144</sup> This includes criminal, quasi-criminal, unpleasant, disruptive, but also harassment, threats of violence and intimidation, as well as racist or homophobic behaviour.

<sup>145</sup> CDA 1998, s 1(1).

<sup>146</sup> See above, text to n 11.

factors which will make a community worthy of protection.<sup>147</sup> Rather than highlighting an innate quality of all communities, they illustrate the changing and flexible nature of anti-social behaviour and its impact on communities, and ASBOs' corresponding attempts to mirror the specific circumstances and characteristics of each community relationship by adopting a flexible concept of community.<sup>148</sup>

## **2. Flexibility or uncertainty?**

Purposive flexibility permeates most of the provisions of the CDA. From the application stage to the determination of the terms within an order, the CDA grants a very broad discretion to relevant local authorities and judges when issuing ASBOs.<sup>149</sup> In terms of their purpose, this flexibility therefore provides a means to adapt an ASBO to the specific circumstances of a given case. However, this degree of specificity and flexibility also creates a relative degree of uncertainty and potential unfairness in relation to the application of ASBOs, and highlights the lack of definition of the precise nature of the community relationships which they seek to protect.

Firstly, the broad discretion regarding the application for an order has created a high degree of discrepancy in the way ASBOs are granted. The Magistrates' Court (Anti-Social Behaviour Orders) Rules 2002 set out a form to be used by relevant authorities, but the rule was amended a few months later and now states that the form in question 'may' be used when applying for an ASBO.<sup>150</sup> Each relevant authority is therefore free to draft its application in whatever form it wishes, and present whatever evidence it deems necessary. Although the provisions in the CDA impose a duty on any relevant authority to consult with both local police and government authorities before making an application for an ASBO under section 1,<sup>151</sup> there is no

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<sup>147</sup> This can be contrasted with Ramsay's analysis of the orders' justification as protecting individuals' 'vulnerable autonomy', see previous ch 1, n 147.

<sup>148</sup> This will be argued in more details in the following chapters, and in particular chapter 3, section IIC and chapter 5, section IIA1 and IIA2.

<sup>149</sup> This discretion operates at many different levels, as will be examined in more details in the following chapter 3, which examines how the courts have interpreted and applied the legal provisions defining the orders.

<sup>150</sup> Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002, SI 2002/2784, r 4 and sch 1, amended by Magistrates Court (Miscellaneous Amendments) Rules 2003, SI 2003/1236.

<sup>151</sup> CDA 98, s 1E, as added by PRA 2002, s 66; if the relevant authority making the application is the

formal procedural requirement to prove that such consultation has taken place (or that a strategy has been agreed to by the partnership).<sup>152</sup> This lack of formal requirements has been addressed by the courts and will be discussed in chapter three, but the content of each application is still defined by how a particular ‘relevant authority’ has defined its anti-social behaviour strategy, how it conducts investigations and the amount of evidence it chooses to submit in a particular application. This open form has surely contributed to a degree of uncertainty and confusion in terms of the way ASBOs have been used.<sup>153</sup>

The absence of a uniform approach is also reflected in the way supporting evidence for the application for the ASBO is gathered, at both a micro and a macro level. At a micro level, a recent report written for the Home Office found that, as ‘the management of [anti-social behaviour] falls to a number of different agencies including the police, housing, and local authorities, [t]he way in which CDRPs collect and store data concerning [anti-social behaviour] and interventions varied widely across the areas.’ What’s more, ‘there was often no consistency within CDRPs in what data were collected ... [which] sometimes resulted in key information on the incident (such as the type of behaviour or the date) and on the perpetrator (for example age, breach details and perpetrator’s needs) being missing.’<sup>154</sup>

While a flexible and open type of application could in principle enable relevant local authorities to target particularly problematic anti-social behaviour in a variety of contexts, the lack of a uniform approach may also lead to potentially unfair situations. Not only will certain types of behaviour be categorised as anti-social and worthy of an ASBO in some areas but not in others, but different authorities will also use different

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police authority or local authority they need only consult with each other, although any other relevant authority would need to consult with both.

<sup>152</sup> Although for certain rules being established by the courts in terms of delegation see *Chief Constable of West Midlands Police -v- Birmingham Justices* (2002) EWHC 1087 (Admin) and *McClarty and McClarty-v- Wigan MBC* (unreported), 30/10/2003.

<sup>153</sup> In particular, official data show a high level of discrepancy with regard to the number of orders issued in each local police area throughout the country (eg four out of forty-two police forces account for nearly 40% of all orders granted : Greater London, Greater Manchester, West Midlands and West Yorkshire). The number of ASBOs is generally correlated with the existence of clear and well-developed strategies to tackle anti-social behaviour, and areas with an inconsistent approach and a lack of coherent standards and cooperation show far fewer orders; see official statistics on ASBOs, Home Office (n 89), and the discussion of the disparity in the application of anti-social measures at both a local and national level in Burney, *Making People Behave* (n 100), ch 8 and pp 144-50.

<sup>154</sup> Alan Clarke and others, ‘Describing and assessing interventions to address anti-social behaviour’ (Home Office Research Report 51, 2011), iv.

types of evidence when applying for an ASBO, creating a high degree of uncertainty in the way we understand and analyse their impact and application.

This is further reflected in the relative lack of reliable data regarding ASBOs on a broader scale. Poor political planning and an over-reliance on de-centralised methods of enforcement have resulted in a lack of adequate systematic data gathering, making relevant and critical evaluation of ASBOs difficult.<sup>155</sup> The only data gathered nationally and systematically is collected by the courts and collated by the Home Office, and gives information regarding the number and nature of ASBOs granted and subsequently breached, the age and gender of subjects of ASBOs, as well as the sentences imposed for breach.<sup>156</sup> It does not, however, address the nature of the behaviour for which ASBOs are being granted, nor does it give any indication of how many orders are applied for, and thus the proportion that are denied by the courts.<sup>157</sup>

This uncertainty also raises issues regarding the use of the concept of community as a justification for the imposition of ASBOs.<sup>158</sup> The nature of the community relationship which can be used to explain and justify the orders is not clearly spelt out in the legislation. Although the policy documents which preceded the CDA give some indication of the political will to protect communities, the provisions laying out the details of ASBOs stop short of defining clearly the nature of this community and the need for its protection.

The next chapter will explore how the courts have interpreted those legal provisions and applied the orders in practice, focusing on the role of the concept of community in determining individual liability.

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<sup>155</sup> Hodgkinson and Tilley, 'Tackling ASB: lessons from New Labour' (n 121), 289; Crawford calls it a 'wilful neglect' by the New Labour government, 'Dispersal Powers and the Symbolic Role of ASB legislation' (n 20), 754.

<sup>156</sup> Home Office (n 89).

<sup>157</sup> Anecdotal evidence suggests that a very low number of applications are granted, based on an early Home Office report claiming that between 1999 and 2001, only 4% of applications were refused, Campbell (n 127), 7, table 2.1; a slightly higher figure appears in a 2005 Human Rights Commission report, as mentioned in Koffman (n 100), 600, where a local solicitor also estimates that 90% of ASBO applications in the study's area are granted; current official figures do not, however, include refusal rates.

<sup>158</sup> For a more critical discussion of how the concept of community can lead to unfair imposition of liability through ASBOs, see chapter 5, section IB2.



### **CHAPTER 3 – JUDICIAL INTERPRETATION OF ASBO LEGISLATION:** **THE INDIVIDUAL/COMMUNITY RELATIONSHIP IN PRACTICE**

The aim of this chapter is to explore how the concept of community has informed the practical interpretation and application of ASBOs, relying on the analysis of reported cases dealing with them, and drawing out common themes and patterns in the way the courts have interpreted the legal provisions of the CDA. The chapter will demonstrate how the courts have clarified and redefined the nature and purpose of ASBOs by emphasising their uniqueness in relation to their criminal and civil elements, as well as the terms of their preventative nature. This results in a multi-faceted approach which further affirms the hypothesis formulated in the first chapter: ASBOs' hybrid form sets them apart from traditional models of civil and criminal liability, due to their focus on regulating community relationships.

Four particular themes are identified:

1. The courts' interpretation of the legal provisions defining ASBOs can be read as a redefinition of the figure of the individual in relation to his responsibility. The lack of *mens rea* requirement abandons the traditional hallmarks of responsibility normally associated with liberal individualism. Liability under an ASBO therefore does not rely predominantly on an individual's subjective state of mind, but rather on an overall course of conduct, reflecting a balancing act between an individual's subjective responsibility, and his engagement with those affected by his behaviour.
2. The legal provisions which create ASBOs limit their application to behaviour affecting individuals 'not of the same household' as the perpetrator. The courts' interpretation of these provisions leads to a different conception of the 'public' sphere in which the behaviour is assessed. This conception recognises that an individual's behaviour can affect his relationship with a particular community and cause harm to that community, in addition to how it affects

society in general. While the latter informs the imposition of criminal liability, the harm caused to a community forms the basis of the liability imposed by ASBOs.

3. The broad judicial discretion written into the CDA and the call for pragmatic interpretation of ASBO legislation has led to a particular emphasis on the value of fairness through flexibility and specificity in their application. This emphasis is particularly present in the courts' approach to the determination of the terms of ASBOs. Liability in the orders is defined by the individual's actual interactions with those affected by his behaviour, creating a dynamic approach to responsibility.
4. The publicity around ASBOs, and the courts' insistence that all orders be clearly drafted and understandable by the individual, affect the communicative nature of ASBOs. The initial orders must have clarity in their drafting and be adapted to the particular defendant, while the publicity surrounding ASBOs is seen as a necessary tool for reassuring and empowering the community affected by the behaviour. The communicative nature of ASBOs essentially adopts a 'first person plural' voice, reifying the importance of community relationships in determining liability for anti-social behaviour.

## **I. Uncovering the True Purpose of ASBOs: ASBOs' Dual Nature from the Judicial Perspective**

As argued in the first chapter, ASBOs sit at a nexus of civil and criminal law, and attempts to characterize them as one or the other narrows their application more than the legislators intended, according to the courts. In *McCann*,<sup>1</sup> the House of Lords lays out the preventative nature of the orders, but does not fully reveal where on the continuum they exist. We turn, then, to further case law to shed light on how ASBOs'

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<sup>1</sup> [2003] 1 A.C. 787.

purpose is perceived by the courts, and how it relates to the protection of a particular community. While the initial order is deemed not to represent punishment, the analogy drawn with licence and bail provisions highlights the specific protective rationale which explains the unique combination of civil and criminal elements.

### **A. ASBOs and the Civil/Criminal Distinction in Case Law**

The central question in *McCann* was whether or not the imposition of an ASBO—i.e. the initial order—constituted a punishment and would therefore qualify as a criminal proceeding in the eye of ECHR rights.<sup>2</sup> This argument focused on the ultimate imposition of a criminal sentence for breach of an order according to section 1(10) of the CDA, which the appellants claimed revealed the true nature of the order: to impose a punishment for anti-social behaviour.

The House of Lords examined the structure and nature of the orders, and found that ASBOs' true purpose was in fact preventative and therefore civil in relation to both domestic and ECHR law.<sup>3</sup> However, the Lords then went on to examine the question of the standard of proof applicable to the initial order, and found that the traditionally civil standard, namely the balance of probabilities, should apply.<sup>4</sup> However the initial order's civil nature was diluted by the fact that the standard of proof that would in fact apply was held to be the criminal one, due to the serious criminal consequences of its breach. Although the heightened civil standard of proof could have theoretically applied, as Lord Steyn in fact recognised, he found that the judge should, when considering the application for an order, and in particular the existence of anti-social behaviour, '*be sure* that the defendant has acted in an anti-social manner.'<sup>5</sup>

The decision in *McCann* in itself sheds little light on the dual nature of ASBOs. The orders are civil and preventative, but punitive and criminal consequences are deemed

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<sup>2</sup> The case is discussed in more details in chapter 1, see text to n 16 and below; beyond any substantive decisions made in the case, the fact that it is the only case decided by the House of Lords on the subject of ASBOs lends it particular significance.

<sup>3</sup> *McCann* (n 1), 1329G–1330A.

<sup>4</sup> 'in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply;' *ibid*, [37] (Lord Steyn).

<sup>5</sup> *ibid* (original emphasis).

serious enough by the Lords to warrant the imposition of a criminal standard of proof when applying for an initial civil order. The reasoning of the Court of Appeal in the later case of *Shafi*, which addressed the distinction between public nuisance injunctions and anti-social behaviour orders, points to a more concrete place on the civil/criminal spectrum.<sup>6</sup> As was discussed in chapter one, ASBOs and public nuisance injunctions are similar in that they both rely on a combination of civil and criminal elements in order to impose liability and regulate a particular type of relationship.<sup>7</sup> *Shafi* dealt with Birmingham City Council's decision to impose a public nuisance injunction in relation to gang-related behaviour against an individual, when it was claimed that they should have sought an ASBO instead.

When discussing the case, the Court of Appeal drew a parallel between the public nuisance injunctions and ASBOs based on the fact that both represented an exceptional power, which should be exercised when the situation represents more than merely a violation of the criminal law.<sup>8</sup> Each can be seen as a tool for local authorities and judges 'to use the civil law in order to control the activities of those who create disturbances.'<sup>9</sup> This approach to public nuisance injunctions and ASBOs shows a different take on the relationship between civil and criminal elements: rather than being pitted against each other, they operate together to produce a more useful legal tool. Furthermore, in an important case dealing with the use of public nuisance injunctions in 1984, the Court of Appeal described the appeal of using public nuisance injunctions and their combination of civil and criminal law as the civil law coming in aid of the criminal law.<sup>10</sup> The roles in this description could arguably be reversed, but either way, this highlights the important interrelationship, and the fact that dual orders cannot be simply categorised as one or the other. Rather it is the interaction between the two, the manner in which each supplements the other, that best encapsulates the intrinsic nature of hybrid civil and criminal instruments, and the importance of the different relationships each seeks to regulate.

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<sup>6</sup> *Birmingham City Council v Shafi* [2008] EWCA Civ 1186.

<sup>7</sup> This similarity is presented in more details in chapter 1, see text to n 87-88.

<sup>8</sup> *City of London Corp v Bovis Construction Ltd* [1992] 3 All ER 697.

<sup>9</sup> *Shafi* (n 6), [26].

<sup>10</sup> *Stoke on Trent City Council v B&Q Retail Ltd* [1984] 1 A.C. 754, 776 A-F.

Case law analysis must therefore move beyond the verdict of ‘truly preventative’ as stated in *McCann*. Adopting this description of ASBOs, the courts have repeatedly rejected the characterisation of the orders as punitive (and therefore criminal) in nature. However, whilst rejecting the argument that ASBOs must be equated with punitive substantive legal offences, the Courts have seen parallels between ASBOs and pre- and post-conviction criminal measures such as bail and licence provisions. We can therefore turn to the cases which consider this comparison, to see what light this throws on ASBOs’ true purpose, and what they seek to protect. This will also help us to consider whether they have a community relationship at their heart.

## **B. ASBOs and the Criminal Law**

Even in *McCann*, the House of Lords recognised that the criminal element of ASBOs could not be ignored. Breach of an ASBO is a standalone criminal offence under section 1(10) of the CDA, the commission of which can result in a sentence of up to five years in prison. As discussed, the gravity of the consequences attached to the ASBO upon breach is a clear reminder of its criminal quality.

As the first part of this section will expose, the courts have followed and re-affirmed the House of Lords’ decision that the initial injunction which forms the first part of an ASBO is not punitive in nature, whether from a procedural or normative perspective. Still, the rejection of this particular interpretation of the purpose of ASBOs does not mean that their criminal element is entirely ignored. Indeed, the second part of the section discusses how the comparison of ASBOs with licence and bail provisions shines a helpful light on the nature of ASBOs as interpreted by the courts, emphasising their protective aim over any punitive purpose.

### **1. Not Punishment**

In *Boness*, the Court of Appeal made it explicitly clear that ASBOs could not be assimilated into punishment, and should be treated differently, both procedurally and

substantively.<sup>11</sup> Despite the lingering possibility of five years in prison for a breach, the punitive nature of the initial orders has consistently been denied by the courts.

According to the CDA 98, an order can also be made upon conviction for a criminal offence if the conditions regarding the existence of anti-social behaviour and the necessity of prohibitions are fulfilled.<sup>12</sup> Although the application of such orders can be delayed until after the completion of any custodial sentence, they will be pronounced during the criminal proceedings leading to conviction.<sup>13</sup> However, and despite the chronological and procedural proximity in the decisions, the courts have been careful to highlight the distinction between the two and the fact that ASBOs are not just a part of the sentencing process. In *Boness*, the Court of Appeal referred to, and condemned, the fact that in some cases, defendants' advocates had been known to seek the imposition of an ASBO at the sentencing stage in the hope that it might influence the sentence given, and as a possible alternative to prison.<sup>14</sup>

The procedural distinction between the initial injunction stage of an ASBO and the subsequent punitive measures is also reflected from a normative perspective in the case law relating to ASBOs. In a case concerning publicity measures regarding an order, the High Court observed that naming and shaming would not justify the use of publicity for an order, as it would then be for the purpose of punishment.<sup>15</sup> Nevertheless, the use of publicity in this case was upheld and justified as it stemmed from reasons other than punishment and naming and shaming, including the reassurance and protection of people affected by the anti-social behaviour, and the potential facilitation of enforcement measures. While this distinction may appear fine, it highlights the significance attached by the courts to the absence of punitive element in the initial ASBO injunction, at least in theory. The purpose of ASBOs was clearly distinguished from retribution, allowing the court to provide a different legal justification for the publicity.

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<sup>11</sup> *Boness v R* [2005] EWCA Crim 2395.

<sup>12</sup> Orders obtained under this procedure are generally referred to as CrASBOs, see ch2, text to n 130 for more details.

<sup>13</sup> CDA 98, section 1C.

<sup>14</sup> The court's position on this particular practice was stated in unequivocal terms, calling for the courts not to be taken in by these arguments and advising that ASBOs should in fact be discussed and ordered only once sentence was decided, *Boness* (n 11), [29].

<sup>15</sup> *R (Stanley, Marshall, and Kelly) v MPC* [2004] EWHC 229 (Admin), [39].

In another case, concerning the imposition of a prohibition to leave a particular residence between 11:30pm and 6am, the High Court considered whether the prohibition, effectively amounting to a curfew, could be justified as part of an ASBO, when a similar curfew could be imposed as a criminal sentence for the defendant's actions.<sup>16</sup> The court recognised that the prohibition imposed by the ASBO was identical to the curfew that might be imposed by section 37 of the CDA upon conviction, but found that the purpose of each measure allowed for a clear distinction. Accordingly, the High Court found that the characterisation of a curfew order will depend on its purpose. A prohibitive curfew imposed as part of a criminal sentence, for example, has the purpose of punishment and is therefore a penalty. A curfew imposed under an ASBO, however, while having the same effect as a 'sentencing curfew', has a preventative and protective, rather than punitive, purpose.<sup>17</sup>

The courts have therefore gone to great lengths to state what they perceive as a lack of a punitive element in the initial injunction stage of ASBOs, distinguishing it from most criminal measures imposing criminal liability.

## **2. ASBOs, bail and licence provisions: revealing the orders' protective purpose**

In their interpretation of ASBO legislation, the courts have drawn instructive comparisons between ASBOs and licence and bail provisions. The Court of Appeal drew a direct parallel between the purpose of ASBOs and of bail provisions, while other comparisons arose out of the interpretation of the necessity criteria in the case of CrASBOs.<sup>18</sup> The role of these provisions in relation to criminal liability and the parallels drawn with ASBOs highlight the protective and pre-emptive function of ASBOs and show a different interpretation of the criminal element in them.<sup>19</sup>

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<sup>16</sup> Powers of the Criminal Courts (Sentencing) Act 2000, s 37.

<sup>17</sup> *Loneragan v Lewes Crown Court & Ors* [2005] EWHC 457 (Admin) [12] (Maurice Kay LJ).

<sup>18</sup> CDA 98, 1(1)(b).

<sup>19</sup> Although they are not strictly speaking hybrid civil / criminal legal instruments, the protective rather than punitive nature of bail and licence provisions reflect the more nuanced functional nature of the criminal law.

### **a) Bail conditions**

The comparison drawn by the Court of Appeal between ASBOs and bail conditions helps to specify the purpose of the criminal element of ASBOs, highlighting the protective and pre-emptive nature of that element. In *Boness*, the Court of Appeal referred to an earlier case, *Werner*, to draw the analogy between the two measures, in which a young woman had been found guilty of multiple cases of robbery and fraud, which all took place in hotels in central London.<sup>20</sup> She was given a custodial sentence and an ASBO barring her from certain establishments. Although the Court of Appeal ultimately decided that an order was not necessary because of individual circumstances and the existence of licence provisions upon release, the facts of the case served as an example for the Court of Appeal to discuss the purpose of ASBOs in relation to *Boness* and the necessity criteria.

When discussing the facts of *Werner* in relation to the necessity of an ASBO (barring the existence of licence provisions), Hooper LJ drew a distinction between an order which would prevent the defendant from entering hotels in the whole of London and a more specific order which would prevent her from entering certain establishments that she had been proved to operate in. The former, broader order would not, according to him, be justified or necessary because it could not be enforced in any meaningful way. The latter, tighter order, on the other hand, would be necessary, and the relevant hotels could be warned to act accordingly if they saw her enter the premises, irrespective of her motive.<sup>21</sup>

According to the Court of Appeal, bail conditions provided a useful analogy with the imposition of an ASBO. Both processes have the practical advantage of being able to intervene before the harmful behaviour takes place, as soon as the terms of the bail or the ASBO are violated.<sup>22</sup> Clear communication of the terms and practical considerations ensure that the individual in question can be stopped pre-emptively. In the context of ASBOs, this practical advantage arises from the ability to give the individual clear instructions on how not to behave in a particular community context.

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<sup>20</sup> *R v Werner* [2004] EWCA Crim 2931.

<sup>21</sup> *Boness* (n 11), [46].

<sup>22</sup> As the Court of Appeal further observed, this mode of operation gives 'the victim [...] the comfort of knowing that if the defendant enters the prescribed area, the police can be called to take action. The victim does not have to wait for the offence to happen again,' *ibid*, [38].



Rather than imposing punishment for behaviour which may have harmed those around him, the Court seems to see the criminal element in ASBOs as a protective measure aimed at regulating an individual's relationship with those affected by his behaviour.

Parallels drawn between ASBOs and licence provisions further highlight this interpretation of the orders' criminal element, as will be presented in the following section.

### ***b) Licence provisions***

The comparison between licence provisions and ASBOs emerged in relation to orders granted on conviction rather than orders on application.<sup>23</sup> Section 1C of the CDA states that an order can be granted if a defendant has been convicted of a relevant offence but an order 'shall not be made except ... in addition to a sentence imposed ... for the relevant offence, or in addition to an order discharging it conditionally.'<sup>24</sup> The granting of a CrASBO will often, upon conviction, be accompanied by a custody sentence. However, the CrASBO would be redundant if its commencement date was that of the verdict, as with most orders, as the incarceration of the defendant would render the terms of the order pointless or impossible to follow. Section 1C(5) therefore authorises the court to delay the start of the CrASBO in the case of a custody sentence, until after the offender is released from prison.

There is no time limitation in the CDA itself, meaning that the start of an order could potentially be delayed for months or even years until the sentence ends. However, the courts have found that in cases where the sentence is more than a few years, an CrASBO will generally not be necessary, either because of the inability to predict behaviour so far ahead in the future, or because licence provisions would be issued upon release.<sup>25</sup>

The parallel drawn with licence provisions highlights an essential element of ASBOs: the creation of extra protection against harmful behaviour by allowing for criminal intervention where an individual has been forewarned. Licence provisions are

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<sup>23</sup> Also known as CrASBOs, see above n 12.

<sup>24</sup> Section 1C(4), CDA 98; 'relevant offence means an offence committed after the coming into force of section 64 of the Police Reform Act', CDA 98, s 1C(10).

<sup>25</sup> See *R v P* [2004] EWCA Crim 287, *R v McGrath* [2005] EWCA Crim 430 and *R v Frost* [2006] EWCA Crim 2705.

designed to control defendants' behaviour when they pose a risk to society, and rely on the possibility of a defendant being recalled to serve the remaining sentence if found in contravention of specific limitations (rather than necessarily having committed harmful behaviour per se). As a legal mechanism, the provisions rely on the powers to intervene and recall an individual if necessary before he commits another crime, in order to protect others around him and enforce the law.

This comparison also shows how the criminal element present in ASBOs can be understood beyond the absence of a punitive intent, and is contained in the practical protection afforded by ASBOs rather than the imposition of punishment. The objective of both licence provisions and ASBOs is clearly geared towards the regulation of an individual's behaviour, albeit in different social contexts. Licence provisions essentially consider past offending behaviour as a guide to control and regulate the offender when released in society. ASBOs operate in a similar manner, designed to issue instructions to an individual regarding his behaviour within a particular community context, where his past behaviour has been found to affect others surrounding him. Despite their difference in scope, the focus of ASBOs on a particular community relationship will generally be subsumed in the general focus of licence provisions, thus making the use of an order potentially redundant.

The courts' approach to the application of ASBOs, and of their purpose, shows that ASBOs are not defined solely by a 'preventative' or civil nature, but also draw protective purpose from their partial criminal nature. This combination creates a legal instrument that has commonalities with bail and licence provisions, but can go beyond the purposes of the criminal law (to deter crimes against individuals) and address the need to protect community relationships. The following section will explore how the significance of that concept of community can be read further into the courts' interpretation and application of ASBOs, and the way it shapes the liability imposed by them.

## **II. The Concept of Community in the Judicial Interpretation of ASBO legislation: Four Characteristics**

Four principal themes emerge around the concept of community from the ways ASBOs have been interpreted and applied by the courts. First, the notion of individual responsibility within the orders is redefined to take into account the individual's relationship with the community affected by his behaviour, balancing the interests of each party, rather than focusing on the individual's subjective state of mind. Secondly, the type of behaviour which ASBOs are designed to tackle is considered in relation to its impact on that particular community and how it is harmed by the behaviour, rather than relying solely on the behaviour's offensive character or a predetermined characterisation of harm against society in general. Thirdly, the broad discretion granted to the courts has led to a particular emphasis on the value of fairness through flexibility and specificity, which translates into a heightened consideration for the circumstances of each case and the relationship between the responsible individual and the community affected. Finally, the communicative nature of ASBOs is shaped by concern for both the responsible individual and those affected by his behaviour, with the desire to both clearly communicate the function of the order, and to foster a better community relationship.

### **A. Redefinition of the Individual and His Responsibility**

The lack of a *mens rea* requirement in the legal provisions defining ASBOs challenges the traditional conception of criminal liability, rendering responsibility not a matter of individual choice to do a specific wrongful act, but of behaving and interacting with others in a way which negatively affects a community. The courts have confirmed the lack of a *mens rea* requirement in the offence of breaching an ASBO, but have also highlighted the importance of subjective 'individual responsibility' when applying the interpretation of the legal provisions defining ASBOs and in particular the 'reasonable excuse' defence. The subjective element developed in those cases illustrates how the figure of the individual is crucially redefined: criminal culpability in

ASBOs is tied to the context of an individual's behaviour rather than his particular state of mind when behaving in an anti-social manner or breaching the terms of his order.

### **1. Lack of *mens rea* requirement in ASBOs**

As described, the provisions of the CDA do not provide for any *mens rea* element, whether in relation to the initial civil order, or the criminal offence of breaking the terms of that initial order. According to the CDA, the imposition of an ASBO will be justified when the individual has acted 'in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.'<sup>26</sup> The court must also find that the order is necessary to protect relevant persons, but does not invoke any required state of mind.<sup>27</sup>

Section 1(5) does provide some element of a subjective requirement regarding the state of mind of the individual, even though it does not constitute a traditional *mens rea* requirement. According to the CDA, any behaviour that the defendant can show was reasonable would then be disregarded by the courts.<sup>28</sup> The use of the word 'reasonable' in this context suggests that the 'reasonableness' of the behaviour would be an objective test, although this provision has not been applied or defined in any meaningful way by the courts during the initial finding of anti-social behaviour. In practice, the nature of anti-social behaviour and the application of the criminal standard of proof to any initial finding of anti-social behaviour make it difficult for an argument based on the existence of a reasonable excuse to succeed. The need to build a strong evidential case in the application procedure, and the often repetitive nature of the behaviour in question, make it unlikely that behaviour which was truly reasonable would reach the stage of a court decision at the initial application stage. Although it is possible that unreported cases hinging on the interpretation of this particular provision exist, it does not seem to have become a highly relevant provision in the courts' interpretation of the nature of ASBOs.

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<sup>26</sup> CDA 98, s 1(1)(a).

<sup>27</sup> CDA 98, s 1(1)(b).

<sup>28</sup> CDA 98, s 1(5).

## 2. Finding a subjective element in ASBOs

The words 'reasonable excuse' are more relevant in relation to the criminal offence of breaching an ASBO's terms. According to section 1(10) of the CDA, 'if without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he is guilty of an offence.'<sup>29</sup> The defendant's state of mind, or indeed even the realisation of his breaching the terms of the ASBO, is irrelevant to his guilt for this particular offence, provided he does not have a 'reasonable excuse' for his action. In this case, the provision is more likely to be used as a defence to an accusation of breaking the terms of an ASBO, especially as only a single act will be required for the individual to be found guilty of the offence. Accordingly, the meaning of 'reasonable excuse' has been addressed by the courts, both in terms of the burden of proof and in terms of the substantive nature of the excuse.

Despite the lack of a *mens rea* requirement, the Court of Appeal in *R. v Nicholson* refused to categorise the violation of an ASBO as a strict liability offence.<sup>30</sup> It held that the existence of a 'reasonable excuse' was a question of fact to be left to the jury, allowing for some subjective introspection about the state of mind of the defendant, an animals' rights activist. She had been given an ASBO forbidding her to be within 500m of premises owned or operated by a particular laboratory, and was found in breach of that prohibition when attending a demonstration, but argued that she did not realise the target of the demonstration was related to the organisation quoted in the order. The prosecution argued that ASBOs create legal prohibitions particular to the individual and effectively extended the law to be applied to her. Ignorance of the terms of the order could therefore not provide an excuse for this offence, under the well-known rule that 'ignorance of the law is no excuse.' Consequently, her lack of awareness could not amount to a 'reasonable excuse' under section 1(10).

The Court of Appeal rejected the prosecution's argument as artificial, and held that the issue of whether ignorance of the terms of the ASBO by reason of forgetfulness or

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<sup>29</sup> CDA 1998, s 1(10).

<sup>30</sup> [2006] EWCA Crim 1518.

misunderstanding constituted a reasonable excuse was a question of fact and should be left to the jury.<sup>31</sup> This interpretation can be seen as an effort by the Court of Appeal to uphold the notion of individual responsibility within this type of liability, despite the lack of subjective requirements of guilt in the definition of the offence.

Judicial attachment to the notion of subjective individual responsibility is reinforced by the severity of the sentence available upon conviction of an offence for breach of an ASBO, as shown in another judgment dealing with the defence of 'reasonable excuse'.<sup>32</sup> In *R v Charles*,<sup>33</sup> a private landlord was charged with breaking the terms of his ASBO by going to one of his properties at 10pm. His ASBO prohibited him from doing so, but the defendant claimed that he had a reasonable excuse for going as he wanted to collect unpaid rent from his tenant and had repairs to carry out in the flat. The decision did not hinge on the facts of the case, but rather on whether the burden for proving the existence of a 'reasonable excuse' should be on the defendant. The Crown Court found that the burden of proof rested with the defendant to prove the existence of a reasonable excuse and the jury found him guilty of breaching the terms of his order.

The defendant appealed, claiming that the burden of proof should be on the prosecution to prove the lack of a reasonable excuse. The Court of Appeal allowed the appeal and found that although an evidential burden rested on the defendant, the ultimate burden remained with the prosecution to prove the absence of a reasonable excuse. In order to reach this decision, the Court of Appeal applied the decision in *Woolmington* and looked at the construction of the CDA in introducing the offence.<sup>34</sup> It found that because of ASBOs' potential for criminalising behaviour which would not otherwise be criminal there was a very strong argument for placing the burden of proof on the prosecution. In fact, the Court of Appeal held that because Parliament left the terms of ASBOs to be determined by the courts, it must have been aware of this criminalisation and could not have intended 'to place any burden of proof on the defendant under section 1(10) which criminalises conduct that Parliament itself has

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<sup>31</sup> *ibid*, [15].

<sup>32</sup> CDA 98, s1(10) holds that on indictment, a defendant is liable to 'imprisonment for a term not exceeding five years or to a fine, or to both.'

<sup>33</sup> [2009] EWCA Crim 1570.

<sup>34</sup> *Woolmington v DPP* [1935] UKHL 1.

not criminalised and has not prescribed the terms in which that can be done.<sup>35</sup>

Although this decision was not particularly controversial, the constructive interpretation of the provision is an example of the courts emphasising the preservation of an element of subjective individual responsibility.<sup>36</sup>

Case law relating to ASBOs builds on this subjective element and contrasts with traditional principles of criminal liability, which generally undertake a more specific examination of the individual's subjective state of mind in relation to a particular act, as opposed to his relationship with a particular community.<sup>37</sup> This suggests that in ASBOs, individual responsibility is related to the context of the individual's actions and his relationship with those affected by his behaviour. The wider impact the behaviour has on the community would therefore not only be relevant to the severity or existence of harm, but also provide a reason to hold an individual responsible for his actions in the first place, potentially redefining the figure of the responsible individual, as will be explored further in the next chapter.

## **B. Finding the Harm of Anti-Social Behaviour: Redefining the Public Sphere**

Case law surrounding ASBOs also takes a different approach to the type of harm that will justify the imposition of liability. The legal provisions defining ASBOs introduce the idea that the behaviour will be considered in the context of an individual's interactions with others in the public space. The courts' interpretation of those provisions shows that a certain type of behaviour is not anti-social by nature, but rather by the context in which it occurs, and the way it affects a specific group of people. This approach differs from the traditional harm principle at play in criminal liability: behaviour will be considered harmful because of its impact on a particular

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<sup>35</sup> *R v Charles* (n 33), [16].

<sup>36</sup> The Judicial Studies Board (JSB) guidelines on ASBOs already specified that it was 'for the prosecution to prove lack of reasonable excuse,' drawing a parallel with section 5(5) of the Protection from Harassment Act 1997 and *R v Evans (Dorothy)* [2005] 1 CrAppR 32 (at page 546), Thomas LJ, 'Anti-Social Behaviour Orders: A Guide for the Judiciary' (Judicial Standards Board, Jan 2007), 27.

<sup>37</sup> For more details, see chapter 4, section IB.

community, rather than being offensive or inherently harmful to society in general.<sup>38</sup> This further highlights the importance of the social context of the behaviour in ASBOs, and the significance of an individual's relationship with the community affected by his behaviour when determining his liability.

### **1. Defining the community context: 'relevant persons' and 'not of the same household'**

The CDA explicitly limits the application of ASBOs, and therefore introduces a particular context in which liability can be imposed, and in which the harm of anti-social behaviour can be identified. Section 1(1)(a) defines anti-social behaviour as that which causes harassment, alarm or distress 'to one or more persons not of the same household' as the individual in question.<sup>39</sup> The CDA also states that an order can only be granted if it is necessary to protect 'relevant persons' from further anti-social acts by him.<sup>40</sup> This circumscribes the sphere of action of an order, as the term 'relevant person' is defined in section 1(1B) in relation to the notion of 'relevant authority' and is limited to individuals subject to the authority of the body in question.<sup>41</sup> The limit is generally geographical, because police forces and local authorities account for the overwhelming majority of ASBO applications, and their powers are distributed on a geographical basis.

The interpretation of the terms 'not of the same household' also introduces a broader significance to the community context which defines anti-social behaviour. Rather than relying on the literal or physical meaning of household, the relevant case law suggests that the most important element in this provision is the limitation it provides on the impact a course of behaviour has on people outside of an individual's personal relationships.

In one case, a man who had assaulted his girlfriend before driving away drunk was convicted for the violence and the driving offences as well as given an ASBO.<sup>42</sup> Despite

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<sup>38</sup> See chapter 4, section 1B1a for a discussion of the harm principles in criminal liability.

<sup>39</sup> CDA 98, s 1(1)(a).

<sup>40</sup> CDA 98, 1(1)(b).

<sup>41</sup> CDA 98, 1(1B)(d).

<sup>42</sup> *R v Gowan* [2007] EWCA Crim 1360.



the fact that some of his behaviour had occurred in public, the Court of Appeal held that the ASBO could not stand, as the couple were living together and intended to do so when the defendant came out of prison.<sup>43</sup> As such, the Court found that the behaviour affected principally the defendant's relationship with his partner, who regrettably had chosen to remain with him. They therefore formed a household, and an ASBO could not be granted.

This principle was reaffirmed and expanded in a later case where a man was found to have sexually assaulted his girlfriend and had indecent photos on his computer.<sup>44</sup> The Court of Appeal held that although the man and his girlfriend were not married, he could not be given an ASBO as his behaviour was directed at his girlfriend who lived with him and did not affect others beyond that personal relationship.<sup>45</sup>

Both of these cases suggest that the only spheres in which behaviour will be considered anti-social and liable to justify the imposition of an ASBO are public spheres. If behaviour only affects individuals who share a household with the perpetrator—not in the literal sense, but relating to a personal relationship between the two—the orders are in theory unavailable.

Nevertheless, the 'not of the same household' requirement has been subject to various interpretations by the courts. In *R v Rush*, the Court of Appeal held that a man whose behaviour was targeted at his parents and occurred in their own home could still be given an ASBO. The defendant had shown long running aggressive behaviour against his parents, came back to 'terrorise' them at their flat where he no longer lived and, according to the case, burgled cigarettes belonging to his dad.<sup>46</sup> On the basis of this behaviour, he was given an ASBO alongside a prison sentence, both of which were upheld (though reduced in length) by the Court of Appeal. The relationship between the defendant and his parents was clearly a personal one, despite their not living together. Even though at least some of the behaviour took place outside the home of the defendants' parents, the Court did not in this case identify clearly the impact of the

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<sup>43</sup> Swift J. approvingly quoted the appellant's submission that the order 'was not intended and could not be used to protect a wife with whom an offender had been and would in the future be cohabiting,' *ibid*, 54.

<sup>44</sup> *R v W (Damian)* [2009] EWCA Crim 2097.

<sup>45</sup> Blair J followed the above-mentioned case of *Gowan* (n 42), stating that 'what applies between husband and wife can plainly apply as between unmarried partners living in the same household,' *ibid*, [12].

<sup>46</sup> *R v Rush (Paul David)* [2005] EWCA Crim 1316.

behaviour on the wider neighbourhood and community.<sup>47</sup> Still, the fact that the defendant did not live in his parents' neighbourhood anymore implied that he had to travel to his parents' house in order to harass them, and his reaction upon finding them not at home would likely affect neighbours living nearby. As a result, his behaviour could be construed to have affected a broader community, beyond the individual impact on his parents.<sup>48</sup> But the case does illustrate how the impact on a surrounding community may justify the use of an ASBO rather than straightforward civil or criminal liability even when the direct victim has a close personal relationship with the defendant.

Three hypotheticals are worth considering to clarify this reasoning. If an individual regularly beat his live-in partner in a public space outside their home where it could be seen or heard by others, it is likely the behaviour would constitute anti-social behaviour under the CDA. But if the defendant took particular care to avoid any possible detection, either by muffling the sound or choosing a particularly remote place to behave in that way, the behaviour would remain criminal but could not be qualified as anti-social, as it would only affect the members of a common household. Finally, imagine a situation where domestic abuse, despite taking place behind closed doors, caused enough of a disturbance to potentially affect neighbours and other residents. In this case, despite the fact that the behaviour took place within the household itself and involved only members of that household, the behaviour might still be held to be anti-social if it caused or was likely to cause harassment, alarm or distress to others living nearby. In this case, the cohabitation of aggressor and his victim might be irrelevant: it is the impact the behaviour has on others in the wider community which will determine whether behaviour can be classified as anti-social. The notion of community as a social entity which can be harmed by anti-social behaviour appears to play a significant role in the use of ASBOs, beyond its role as a local context to the behaviour.

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<sup>47</sup> 'On the afternoon of July 14, 2004, the appellant's father answered the door to find the appellant there. A discussion took place in which he asked to see his mother. She came to the door. The appellant asked her for some cigarettes. She refused. He became more agitated. His father returned to the door from the living room because of the commotion that was taking place at the door.' *ibid*, [201]-[202].

<sup>48</sup> In reality, this reasoning was not explicitly followed by the court in question, raising questions as to the justification of the order in this case, see below, chapter 5 for a critical examination of the use of ASBOs under a model of community-based liability.

## **2. ASBOs and the harm of anti-social behaviour: impact on a community**

Whilst the concept of anti-social behaviour is not in itself new or unique, the fact that ASBOs have been constructed to consider harm to a particular community as their defining characteristic distinguishes them further from other models of liability, particularly criminal liability.

The definition of anti-social behaviour in the CDA is broad and open to interpretation, using terms well-known by the courts. The courts have spent little time discussing the meaning of anti-social behaviour in relation to ASBOs, short of providing some elusive threshold of reaction, to indicate the level beyond which the behaviour will be deemed harmful enough.<sup>49</sup> In *R v Jones (Annwen)*, political activists had blocked trains in the proximity of an arms fair in an attempt to disrupt the event.<sup>50</sup> The Court of Appeal held that the behaviour in this case did not pass the threshold and therefore did not amount to anti-social behaviour. The Court explicitly distinguished harassment, alarm or distress from mere frustration, anger and annoyance, highlighting the fact that the latter did not amount to anti-social behaviour.<sup>51</sup>

The openness of the legislative provision and the fact that the terms ‘harassment, alarm or distress’ are used in other measures can perhaps explain the courts’ approach, which has focused on the actual impact a course of behaviour will have on those affected by it, rather than the behaviour’s general capacity for causing harassment, alarm or distress to others in society. This is confirmed in the Judicial Studies Board (JSB) guidance, which states that ‘whether conduct is anti-social is primarily measured by its consequences and the effect it has, or is likely to have, on a member or members of the community within which it is taking place.’<sup>52</sup>

Rather than being defined solely by the offense or harm it may cause to others in general, the crucial element in determining whether behaviour is anti-social resides in

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<sup>49</sup> The term ‘harassment, alarm or distress’ is generally associated with public order offences; the Public Order Act 1986 make it a criminal offence to cause ‘harassment, alarm or distress’, whether intentionally (s 4) or through the use of abusive or threatening language (s 5); These offences can also be racially and religiously aggravated, according to CDA 98, s 31(1)(c).

<sup>50</sup> [2006] EWCA Crim 2942.

<sup>51</sup> *ibid*, [45].

<sup>52</sup> JSB guidance (n 36), 11.

the way it affects or harms a group of people defined as a community. This distinguishes the orders from criminal liability, in which the inherently harmful nature of a particular type of behaviour calls for the imposition of liability if it harms the interests of other individuals in society and is carried out with the relevant state of mind.<sup>53</sup>

The existence of CrASBOs provides a particularly striking perspective on this distinction, as the same behaviour can lead to the parallel existence of both an ASBO and a criminal conviction, with distinct considerations of harm for each.<sup>54</sup> CrASBOs are granted upon conviction for an offence if the court, at the suggestion of the CPS or a relevant agency, or indeed at its own initiative, finds that the behaviour in question calls for an order. Anti-social behaviour for which an order is deemed necessary generally overlaps with, and will often be the same behaviour as the criminal behaviour in question. However, and despite the same source of harm, the orders have been explicitly held by the court to represent a distinct type of liability, calling for a unique examination of the harm involved.

The use of ASBOs to combat prostitution highlights how one course of behaviour can be considered from two such distinct perspectives. In *Chief Constable of Lancashire v LM Potter*, the High Court dealt with the issue of whether ASBOs could be granted against prostitutes.<sup>55</sup> The judgment recognised that although not all prostitution on the streets of a residential area would constitute anti-social behaviour according to the CDA, especially where there is not a ‘significant concentration of their activities in a particular area to mark it out as “red light district”,’ the granting of an ASBO could not be ruled out.<sup>56</sup> In this case, the appeal challenging the Deputy District Judge’s decision to refuse the application was allowed, and the case was referred back to the first instance jurisdiction.

According to the High Court’s judgment, the potential anti-social quality of acts of prostitution did not reside solely in the behaviour itself, but in the impact it would have, in practice, on the neighbourhood in which it occurred. In this case, the judge

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<sup>53</sup> See chapter 4, section IB1.

<sup>54</sup> The introduction of CrASBOs is discussed in more details at ch 2, text to n 128.

<sup>55</sup> [2003] EWHC 2272 (Admin).

<sup>56</sup> This section examines the reasoning behind the decision and does not address the problematic use of ASBOs to target prostitution, which is discussed and criticised in chapter 5, section IIA.

made it clear that if a particular area was not singled out as a 'red light district' by the number of prostitutes and the occurrence of the behaviour, then an order would not be necessary. It was, according to the Court, a question of fact and degree, dependent not solely on the defendant's behaviour itself, but also on the context of her behaviour, and whether it contributed to the 'red-light character' of the neighbourhood.<sup>57</sup> The harm caused in this instance was therefore clearly identified in relation to the community, as opposed to being inherently harmful in the criminal sense of the term. Although prostitution itself is not a criminal offence, loitering and soliciting on the street can be, for reasons of public decency and the protection of morals.<sup>58</sup> The harm considered in this particular instance was distinguished in principle from the one in related criminal offences.

The respondent's actions in this case were considered harmful, at least in theory, because they were held to adversely affect the particular community of residents living in the area. Although this judicial reasoning does not necessarily reflect a justifiable application of liability in practice, it is useful to understand the construction of the harm of anti-social behaviour against a community in principle..<sup>59</sup>

This perspective was affirmed in a more recent case regarding drug-related offences. In *Barclay*, numerous defendants were found guilty of drug offences, including drug-dealing, and were given ASBOs containing geographical restrictions, a restriction of association between themselves, and prohibitions against using unregistered mobile phones.<sup>60</sup> When considering the necessity of such orders, the Court of Appeal highlighted the fact that the orders in this case were not just about drug-dealing but rather 'targeted ... the nuisance, fear and intimidation which were conducive and preparatory to open drug-dealing.'<sup>61</sup> The Court explicitly made the distinction between the harm linked to the criminalisation of drug-dealing, and harm

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<sup>57</sup> *Potter* (n 55), [46] (Auld LJ).

<sup>58</sup> 'It is an offence for a person (whether male or female) persistently to loiter or solicit in a street or public place for the purpose of prostitution', Street Offences Act 1959, s 1(1), as amended by the Policing and Crime Act 2009.

<sup>59</sup> For a critical assessment of this decision, see chapter 5, text to n 96. Moreover, use of ASBOs to target prostitution has also raised criticism relating to the possibility of imposing a custodial sentence for prostitution if the order is breached, against the express intention of Parliament, which abolished the use of imprisonment for prostitution offences, according to the Criminal Justice Act 1982, s 71.

<sup>60</sup> *R v Barclay (Kirk Jordan)* [2011] EWCA Crim 32.

<sup>61</sup> *ibid*, [34].

that emerged from the anti-social nature of the same behaviour. Drug-dealing is considered a crime because it involves the distribution of a prohibited substance for gain, encourages crime, and promotes harmful behaviour. In this decision, drug-dealing was considered anti-social for different reasons, centred upon the way it caused harm to a particular community rather than its impact on society in general.<sup>62</sup>

All these examples reflect the central role community has in the way the harm of anti-social behaviour is analysed and the way liability is imposed through ASBOs. Legal provisions of the CDA delimit the sphere in which an ASBO will be applicable, based on the local impact of the behaviour, by using terms such as ‘relevant persons’ and ‘not of the same household’. The interpretation of those terms has clarified the sphere of action of the orders, focusing on local or small-scale social settings whilst excluding behaviour which only affects personal relationships. Furthermore, the notion of anti-social behaviour and the way it has been interpreted by the courts assesses harm based on how it has affected a particular community relationship, rather than defining a particular type of behaviour as inherently harmful. In practice, this focus on a particular community relationship in the context of ASBOs is also reflected in the courts’ approach to the interpretation of the orders, as will be discussed in the following section.

### **C. Judicial Discretion, Dynamism and Flexibility**

The broad judicial discretion written into the legal provisions defining ASBOs has provided the courts with a tool to adopt a flexible approach to their application, and enabled them to take into account the circumstances of each case. The House of Lords’ call for pragmatism reflects the legislative intention behind the CDA and has led to an emphasis on flexibility and specificity when using ASBOs, both from a procedural and a substantive perspective. As described, this approach has enabled the courts to tailor the terms of a given order to the circumstances of specific cases, taking into

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<sup>62</sup> This case was also important for the way in which it applied the idea of community relationships, for more details of the community context of the case of *Barclay* (n 60), see chapter 5, section IB1a.

account the nature of the anti-social behaviour as well as the individual's relationship with the affected community.

## **1. Pragmatism and the orders' procedural requirements**

The most prominent facet of the broad judicial discretion contained in the CDA relates to the very notion of 'anti-social behaviour'. When its definition, or lack thereof, was discussed in Parliament, ministers insisted that a more precise definition was unnecessary and relied on the idea that judges should not be restrained in their interpretation of it.<sup>63</sup>

This broad discretion was acknowledged by the House of Lords in *McCann* as well. The Lords recognised the need for what they saw as a 'pragmatic' approach to ASBOs, favouring evaluation and judgment over a purely probative exercise when considering the facts:

pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard. [...] The inquiry under section 1(1)(b), namely that such an order is necessary to protect persons from further anti-social acts by him, does not involve a standard of proof: it is an exercise of judgment or evaluation. This approach should facilitate correct decision-making and should ensure consistency and predictability in this corner of the law.<sup>64</sup>

This call for pragmatism was primary, but Lord Steyn's claim regarding consistency and predictability points to an additional perceived value in the approach: the normative importance of the evaluative exercise carried out by magistrates and judges when deciding whether or not to grant an order.

ASBOs can be obtained in one of two ways, either by application as originally planned by the CDA, or upon conviction as introduced by the Police Reform Act 2002.<sup>65</sup> There is no specific procedural form to be used when applying for an ASBO, and each relevant authority is free to draft its application in whatever form it wishes.<sup>66</sup> Post-

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<sup>63</sup> In the Judicial Studies Board guidance to the orders, this measure was held to give judges 'flexibility in deciding what acts are anti-social,' JSB Guidance (n 36), 10.

<sup>64</sup> *McCann* (n 1), [37].

<sup>65</sup> PRA 2002, s 61-65, introduced a new section 1C(2) in the CDA 1998, which reprises the exact same words of section 1(1), despite small differences in the application process.

<sup>66</sup> The Magistrates Court (Anti-Social Behaviour Orders) Rules 2002 (SI 2002/2784), r 4 and sch 1 set out a form to be used by relevant authorities when applying for an order. However, the rule was amended a

conviction ASBOs may be granted if the prosecutor in the specific case makes such a request or based on the court's discretion.<sup>67</sup> The procedural rules when making an order under section 1C of the CDA are defined by the Criminal Procedure Rules which set out a number of requirements for the application, dealing mainly with the notification of the defendant, rather than any specific procedural form.<sup>68</sup>

This discretionary power and the lack of specific formal requirements regarding the procedure for applying for an ASBO has been addressed by the High Court and the Court of Appeal in a number of cases, highlighting what they saw as the value of this inherent flexibility. According to the High Court, the CDA's lack of any particular procedure for making an order is remedied by an obligation on the courts to act fairly, and consider all relevant matters.<sup>69</sup> The notion of fairness was not developed further in relation to the procedural requirements, other than to point out that 'what fairness requires and what considerations are relevant will depend upon the circumstances of each particular case.'<sup>70</sup> This requirement to act fairly when exercising judicial discretion was distinguished from a need for basic clarity, and the case-by-case approach to the notion of fairness in ASBOs was later confirmed by the Court of Appeal.<sup>71</sup>

These general principles were reinforced in a decision by the High Court concerning an application for an ASBO relating to a long course of behaviour.<sup>72</sup> Because the application for an ASBO is made by way of a complaint to a Magistrates' Court,<sup>73</sup> the court cannot hear a complaint unless it is made within six months from the time when the behaviour occurred, according to section 127 of the Magistrates' Courts Act 1980.

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few months later by the Magistrates Court (Miscellaneous Amendments) Rules 2003 (2003/1236) and now states that the form in question "may" be used when applying for an order.

<sup>67</sup> This discretion is to be exercised if 'the court thinks it appropriate to do so,' CDA 1998, s 1C(3) as amended by the Anti-Social Behaviour Act 2003.

<sup>68</sup> Although the CDA 1998 does not refer to an application any more, the Criminal Procedure Rules (CPR) still do: CPR 2010, pt 50.3(3), states that the prosecutor must serve a 'notice of intention to apply for such an order' on the court officer, the defendant and any other person 'on whom the order would be likely to have a significant adverse effect;' the notice must contain a summary of the relevant facts, identify the evidence on which the prosecutor relies in support and specify the order sought.

<sup>69</sup> In fact, it was 'common ground that, in making an order, the magistrates' court must act fairly and have regard to all relevant considerations,' *C v Sunderland Youth court, Northumbria Police and Crown Prosecution Service* [2003] EWHC 2385 (Admin), [25] (Sullivan J).

<sup>70</sup> *ibid.*

<sup>71</sup> *R v P* [2004] EWCA Crim 287, [19] (Henriques J).

<sup>72</sup> *Stevens v South East Surrey Magistrates Court* [2004] EWHC 1456 (Admin).

<sup>73</sup> CDA 1998, s 1(3).



Some of the behaviour in the case extended beyond the six-months mark and should therefore have been excluded from consideration when deciding whether to grant an ASBO. However, the High Court ruled that in this case and for ASBOs in general, evidence of 'out of time' incidents could be considered by the court in support of the evidence relating to 'in-time' incidents. Auld LJ remarked that in this and most such cases, fairness called for events which occurred out of the six-month period to be taken into account when considering whether in-time incidents did in fact amount to a course of anti-social behaviour.<sup>74</sup>

This illustrates the pragmatic stance taken by the courts in relation to ASBOs, and reveals the importance attached by judges to using the specifics of each situation to achieve a fair result in relation to the procedural requirements, i.e. allowing each case to be decided based on its own particular facts. But, as will be discussed in the following subsection, concern for flexibility and specificity goes beyond the procedural requirements, and also affects the courts' approach to the substantive provisions which define ASBOs.

## **2. Flexibility and Specificity in the orders' application: taking into account the community context**

Beyond the procedural requirements for applying and granting an ASBO, the legal provisions defining the terms which can be included in an order further refine how judicial discretion and pragmatism have led to a flexible and case-specific approach. Restrictions regarding the terms of ASBOs are highly case-specific as well, rather than defining general types of prohibitions that are acceptable to impose.

Section 1(4) of the CDA states that:

[i]f, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order.

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<sup>74</sup> *Stevens* (n 72), [18].

Some flexibility resides in the use of the word ‘may,’ relating to the power of the judge to make an order, but it is the lack of definition of the possible terms that can be imposed that allows for broadest discretion.<sup>75</sup> Once a judge has decided that an ASBO is necessary to prevent further anti-social behaviour, he can include in the order any prohibition that he deems necessary (with the sole caveat that it must be prohibitive rather than mandatory). This provision has been defended in the JSB guidelines on ASBOs as allowing orders to be ‘tailored to the defendant and not designed on a word processor for generic use’.<sup>76</sup>

Related case law strongly condones using this discretionary power in a fair and responsible way. But rather than outlining restrictive general principles, it has focused on the requirement of specificity, and an imperative to stick to the facts of a particular case, as it relates to the specific behaviour and the way it affects a particular community.

This approach was put into practice in *Boness*, a case in which the Court of Appeal considered two different sets of facts.<sup>77</sup> The first concerned a persistent offender who was given a detention order in a young offenders’ institution, as well as a wide-ranging ASBO. The second dealt with a group of football supporters convicted of various offences and given ASBOs as well. The appeal challenged the existing orders on a number of points, including the imposition of wide-ranging terms and their necessity in relation to custodial sentences. The Court of Appeal quashed all orders but two (which were more restrained in their provisions). More importantly, the Court reviewed the existing case law on ASBOs and laid out important principles with regard to the terms of an order. In particular, it referred to a working group led by Thomas LJ, which identified best practices adopted by the courts regarding ASBOs.<sup>78</sup> These included, in relation to the terms of an order, that:

- the prohibition should be capable of being easily understood by the defendant;

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<sup>75</sup> The necessity requirement, to be decided by the judge according to the need for protection of ‘relevant persons’, already provides for a broad discretion in terms of whether or not to grant an order, and no reported cases seems to have raised issues in relation to this power of the court.

<sup>76</sup> JSB Guidance (n 36), 15.

<sup>77</sup> *Boness* (n 11).

<sup>78</sup> *Boness* (n 11), [22].

- the condition should be enforceable in the sense that it should allow a breach to be readily identified and capable of being proved;
- exclusion zones should be clearly delineated with the use of clearly marked maps; and
- individuals whom the defendant is prohibited from contacting or associating with should be clearly identified.

These limitations are not related to the nature of the restrictions that can be imposed on an individual's behaviour, but rather focus on the specificity and clarity of the restrictions in relation to a particular individual. According to these principles, the main issue a judge should be concerned with is whether the terms are specific enough in relation both to the individual concerned and the type of anti-social behaviour which gave rise to the orders.

In keeping with the hypothesis expressed earlier in this thesis, the aim of ASBOs in this context therefore seems to be to regulate and control the behaviour of the responsible individual in a particular social setting. Whereas criminal regulations must be clear and understandable for the whole of society, and will issue rules of behaviour which apply to all individuals in society, the provisions of an ASBO are aimed specifically at one individual, in the context of his relationship with a particular community.<sup>79</sup> The terms of the order must therefore be clear and understandable to him specifically, but must also match the behaviour and its impact on the community he has affected.

Indeed, the High Court found that a literal prohibition requiring the individual generally not to behave in an anti-social manner was not acceptable, and violated the requirement of specificity, as it did 'no more than repeat offences contained within the Public Order Act 1986.'<sup>80</sup> The decision was based on a Divisional Court ruling and reaffirmed by the JSB guidance on ASBOs, which states that 'if included in a prohibition, the term 'anti-social behaviour' requires further definition or limitation so as to provide clarity to the defendant.'<sup>81</sup> These limitations can relate to a specific type

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<sup>79</sup> For more details on the value of certainty and equality in the criminal law, see chapter 4, section 1A.

<sup>80</sup> *Heron v Plymouth CC* [2009] EWHC 3562 (Admin), [8].

<sup>81</sup> JSB Guidance (n 36), 52, referring to *CPS v T* [2006] EWHC 629 (Admin).

of behaviour (e.g. a prohibition of begging or loitering for the purpose of begging or a prohibition of drinking alcohol in public) or can be phrased in terms of a particular characteristic of the individual's previous anti-social behaviour (e.g. in recognition of the fact that it can be worse when in larger groups). In the latter case, the court can decide to prohibit congregating with a specific number of people and behaving in a manner likely to cause harassment, alarm or distress. Commonly the circumstances of the behaviour in question relates to a particular location, often a specific neighbourhood or public building such as a police station, hospitals or housing office.

The range of such prohibitions renders the possibilities almost endless, and the limitations are equally vast and case-specific. For example, in the case of a 15 year old who was convicted of a public order offence, the terms of his order prohibited him from congregating in a group of three or more people.<sup>82</sup> However, the High Court found that such a prohibition would have prevented him from attending sporting events and would therefore be disproportionate. The specific prohibition was redrafted in order to allow his participation in sporting events without being in contravention of the order. Although the anti-social nature of the behaviour and the harm it caused the community was clearly associated with congregating with others in large numbers, the court recognised that congregating in similar numbers to play football would not have the same negative impact on a community and therefore tailored the terms of the order to reflect this distinction.

#### **D. Individuals and Communities: Defining the Communicative Nature of ASBOs**

As discussed, ASBOs do not use retrospective punishments as a source of deterrence, but rather preventive or protective conditions that shape or restrict an individual's behaviour.<sup>83</sup> The specificity of the terms of the orders means that they can effectively represent a guide for the individual on how to behave in a particular context, with the threat of criminal sanction if those rules are not adhered to. The

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<sup>82</sup> *N v DPP* [2007] EWHC 883 (Admin).

<sup>83</sup> See above, text to n 11, for a more detailed discussion of the distinction made between punishment and ASBOs by the courts.

communicative function of an order is therefore significantly different from traditional criminal offences.

Various features of ASBOs illustrate this nature in practice, including requirements imposed by the courts in relation to the specificity of the terms and specific requirements concerning the publicity of orders against young persons. Publicity provisions in particular demonstrate the communicative function of the orders towards the community in general as well as the individual in question. The orders seem to be perceived by the courts as a mediating element between the individual and the community in question: both telling the individual what behaviour is expected of him in his interactions with a particular community, and relating to that community what measures are taken in its name, as well as giving it tools to hold the individual accountable.

## **1. Specific terms and ‘personalised’ communication**

As the Court of Appeal in *Boness* made clear, the terms of an ASBO must be drafted in clear and precise words.<sup>84</sup> If the terms contain an exclusion zone, the order should include a map to outline exactly the zone in which the individual subject to the order is not to be found, and if the terms include a prohibition against associating with specific known individuals, the order should include a full list of names.<sup>85</sup> The terms of an order are required to be clear not only for their general ease of application, but also to the specific individual against whom they are granted. These measures are meant to avoid confusion and ensure that a breach will be easily spotted and acted upon, and highlight the communicative function of ASBOs, which is focused on the recipient of the order himself.

This was emphasised in two recent cases dealing with individuals with mental health issues. The first regarded an order granted against a young man for aggressive

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<sup>84</sup> *Boness* (n 11).

<sup>85</sup> Appendix 2 of the JSB Guidance (n 36) states that ‘the identity of others with whom the defendant must not assemble must be clearly noted in as much detail as possible in the ASBO;’ this can include reference to ‘street-names’ or nicknames if necessary, as was the case in *Barclay* (n 60).

begging in a city centre,<sup>86</sup> and the second a woman who had an alcohol dependency problem and had committed a number of minor criminal offences.<sup>87</sup> In both cases, a central question concerned the capacity of the individual to understand the order and comply with it. The High Court held in *Cooke* that it would be ‘wrong’ to make an ASBO against an individual who by reason of mental health would not have the capacity to understand or comply with it, a principle which was followed in the second case of *Fairweather*. Yet in both recent cases, the High Court found that despite the obvious limitations of the defendants’ cognitive abilities due to ill mental health, they could be said to be capable of understanding the nature and requirements of the orders against them and the orders were upheld.<sup>88</sup> In the case of *Cooke*, the High Court found the defendant—despite serious mental health and drug issues which had led him to severe self-harming—had the ‘mental capacity to understand what an ASBO meant and what it prevented him from doing.’<sup>89</sup> Whether or not the High Court’s assessment of the defendants’ mental capacity was correct,<sup>90</sup> this clearly demonstrates its approach to the principles of capacity in the context of ASBOs. The emphasis is not on the mental capacity of the defendant in general, but rather on the defendant’s mental capacity to understand the specific order taken against him or her.<sup>91</sup>

The communicative function of ASBOs, and in particular the terms of the prohibitions imposed, are clearly focused on the capacity of the specific individual to understand the terms of the order and adjust his behaviour accordingly. The ASBO effectively becomes a personalised guide of conduct, reminding an individual what behaviour is acceptable and what behaviour is not. This purpose was explicitly stated

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<sup>86</sup> *R (application of Cooke)* [2008] EWHC 2703 (Admin), for more details of the case, see chapter 5, section IA2b.

<sup>87</sup> *Fairweather v Commissioner of Police for Metropolitan* [2008] EWHC 3073 (Admin), for more details of the case, see chapter 5, section IA2b.

<sup>88</sup> The defendant in *Cooke* suffered from a mental health disorder which manifested itself, amongst other symptoms, through his self harming. In the case of *Fairweather*, the defendant had a severe alcohol dependency problem and it was accepted that her anti-social behaviour resulted directly from that problem.

<sup>89</sup> *Cooke* (n 86), [16].

<sup>90</sup> For a critical evaluation of the decision, and in particular its approach to the mental faculties of the defendants in light of their mental illnesses, see chapter 5, section IA2.

<sup>91</sup> Incapacity in the criminal law is generally defined as insanity, the test for which is outlined in the case of *M’Naghten* (1843) 10 C & F 200, which states that a defendant will be found insane if at the time of committing the offence, he was ‘labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.’

by the High Court in *Hills v Chief Constable of Essex*, where it was found that the terms of an order could include criminal prohibitions as a 'reminder' of what is criminal.<sup>92</sup>

In criminal law, the rule of law requires legal provisions to be readily accessible and understandable, but this requirement is a general one and the principal function of a criminal statute is not necessarily to make itself easily understood.<sup>93</sup> As a legal mechanism, criminal statutes in practice tend to criminalise specific instances of behaviour retrospectively, in the sense that punishment is imposed after the criminal act has occurred, based on the idea that the prohibition in question was clear and known to all. By contrast, ASBOs' principal function is to highlight, in terms clearly understandable to the individual in question, what he cannot do and, indirectly, what behaviour is therefore expected of him. This high degree of specificity provides a powerful means to alter the process of communication involved in the imposition of criminal liability.

## **2. Communicating with the community**

The communicative function of ASBOs is not limited to the formulation of personalised rules of behaviour for individuals against whom an order is granted. As discussed, the voice of the law is also, through the orders, destined to reach the community affected. The needs of communities and their protection from anti-social behaviour were stated concerns of the policy rationale behind the introduction of ASBOs, and were translated into the legal provisions of the CDA, as was discussed in the previous chapter. The broad definition of anti-social behaviour, the procedural rules allowing for hearsay evidence, and the communicative function of ASBOs (in particular through the judicial interpretation of the rules regarding the publicity of the orders) are all directly related to the perceived needs of communities.<sup>94</sup>

Case law dealing with orders granted against a child or young person shed light on these priorities. According to the CDA, reporting restrictions regarding proceedings in

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<sup>92</sup> [2006] EWHC 2633 (Admin).

<sup>93</sup> On the state of criminal law in general, see for example Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review, 225.

<sup>94</sup> Because of the orders' civil status, hearsay evidence, generally by professional witnesses such as police officers, is accepted when applying for an order, as was discussed in chapter 2, see text at n 105.

which children and young persons are concerned do not apply if the child or young person in question is charged with an offence under section 1(10).<sup>95</sup> Indeed, because the proceedings for the granting of an ASBO do not take place in the Youth Court, but will generally be in the Magistrates' or Crown Court, such reporting restrictions do not even exist.

In one relevant case an 11-year-old boy who had been found to be harassing his community, including violent episodes against other children, was given an ASBO.<sup>96</sup> The refusal of his application for an order restricting the publication of proceedings under section 39 of the Children and Young Persons Act 1933 (the CYPA) was appealed to the High Court. While the Court ultimately found in favour of the appellant,<sup>97</sup> with the young age of the child being the determining factor in the decision, the Court emphasised the fact that the 'local community ha[d] a proper interest in knowing who has been seriously and persistently damaging its fabric.'<sup>98</sup>

In another case, two 17-year-old defendants were given ASBOs in relation to serious anti-social behaviour in their neighbourhood, lasting over two years.<sup>99</sup> Lengthy proceedings were conducted under an order for restriction of publicity made under section 39 of the CYPA, which was prolonged when the ASBOs were fully granted.<sup>100</sup> Ultimately the restriction order was challenged by way of case stated to the District Court judge, who found that the order should remain.

While both cases eventually upheld the orders restricting publicity of the ASBOs, they nonetheless reinforced the importance of the function of the publicity and highlighting its value in helping enforce the ASBOs. The *Stanley* case specifically referred to the 'publication strategy' adopted by local councils such as Manchester in relation to ASBO applications: publication of the order on the authority's website, production of leaflets distributed within the exclusion zone, and the publication of the information in the local borough newsletter. The High Court found that local authorities could rely on these kinds of publicity in order to 'inform, to reassure, to

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<sup>95</sup> CDA 98, 1(10D)(a), although subsection (b) allows for reporting restrictions to be granted according to Youth Justice and Criminal Evidence Act 1999, s 45.

<sup>96</sup> *R (T) v St Albans City Council* [2002] EWHC 1129 (Admin).

<sup>97</sup> The case was then re-sent to the Crown Court for a final decision which was not reported.

<sup>98</sup> *St Albans CC* (n 96), [22].

<sup>99</sup> *R (Stanley et al.)* (n 15).

<sup>100</sup> It took 5 months to obtain interim orders under section 1D of the CDA 1998, and a further 6 months for the full orders to be granted.



assist in enforcing the existing orders by policing.<sup>101</sup> Although the Court reaffirmed that publicity could not be used for the ‘naming and shaming’ or punishment of the individuals involved, the use of ‘criminal’ and ‘colourful language’ was found not to be prejudicial, nor was the publication of the individual’s name, photograph and partial address, as it helped put the message across to the community.<sup>102</sup> Beyond this debatable balancing of the interests of the individual and of the community, the publicity surrounding the ASBOs was recognised by the High Court as serving both the individual recipients and the community affected by the behaviour.<sup>103</sup>

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<sup>101</sup> *R (Stanley et al.)* (n 15), [40].

<sup>102</sup> *ibid.*

<sup>103</sup> The balancing act in these cases opposed the rights of the communities in which the behaviour had occurred to the rights of the young child under the Children and Young Persons Act 1933 and the human rights of the two brothers in the second case, and although the court found in the defendants’ favour in the end, the rights and interests of the community to be informed about the nature of the orders was clearly stated by the court, both in principle but also in practical terms.

## **CHAPTER 4 – REDEFINING THE INDIVIDUAL/COMMUNITY**

### **RELATIONSHIP: TOWARDS A COMMUNITY-BASED MODEL OF LIABILITY**

This chapter explores the theoretical principles underlying a model of community-based liability. As presented throughout this thesis, all models of liability, including civil and criminal, can be seen as seeking to regulate a particular relationship. Each model reflects a different conception of responsibility, which can be expressed by the formula ‘an individual D is responsible to S, for X, in his quality as  $\mu$ .’<sup>1</sup> Duff’s responsibility formula distinguishes responsibility from the liability itself: while responsibility is a necessary prerequisite to any finding of liability, it is not a sufficient condition and will not always lead to liability. Conceptually, this helps distinguish between the abstract notion of responsibility, arising from a particular relationship, and the legal model of liability which assigns consequences for it.<sup>2</sup>

The first part of this chapter will explore the responsibility on which criminal liability is based, and how it is shaped by a liberal conception of the responsible individual as an isolated and autonomous figure. This will highlight the ways in which this model of liability essentially ignores the social context of an individual’s behaviour and his relationship with any given community.

The second part of the chapter will introduce a different conception of individual responsibility, which can form the basis for a different model of liability. Within this model, communitarian principles provide a starting point to build a vision of the responsible individual which can be defined by his social interactions while still preserving his autonomy and responsibility. A flexible concept of community, comprising a web of understanding which draws individual members together,

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<sup>1</sup> This formula is taken from Duff’s account of responsibility as relational in R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007), 23.

<sup>2</sup> In criminal liability, this distinction can be clearly illustrated by the examples of incapacity and self defence: in the former, the individual in question is held to be neither responsible nor liable, whereas in the latter, the individual will be responsible and therefore held accountable before the court, but he will ultimately not be liability if found that he acted in self-defence; *ibid*, 21.

provides a counterpoint to the figure of the individual, and forms the basis for an alternative model of community-based liability.

The final part of this chapter will expand on this model of liability, outlining two key requirements that reflect the nature of the relationship it seeks to regulate. Ultimately, the responsibility formula will be reframed as D being responsible to a community for interfering with its protected interests, as a socially constituted individual. In recognition of the particular relationship underlying this responsibility, liability will not be premised on the existence of pure subjective guilt, but on the individual's wilful engagement with that particular community.

## **I. Liberal Individualism and Criminal Liability: Towards an Asocial Figure of the Responsible Individual**

The development of criminal liability has been heavily influenced by liberal principles. At the heart of criminal law is the relationship between the figure of the individual as an independent and autonomous figure, and society (as represented by the state). This leads to a subjective notion of responsibility within criminal liability, which considers an individual's responsibility in abstraction from the context of his actions and social surroundings.<sup>3</sup>

The first part of this section will examine the philosophical principles which provide the context for this model, in particular the liberal figure of the autonomous individual. The second part will outline the ways in which liberal individualism has shaped criminal liability: with few recent evolutions, it is primarily defined by its focus on the autonomous asocial individual and the lack of consideration for wider social and community relationships.

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<sup>3</sup> As will be presented later on in this chapter, this abstraction is not applied consistently throughout the criminal law; Kelman observes in his critique of the criminal law's interpretive constructs that 'criminal jurisprudence acknowledges the plausibility of a determinist discourse, but it *acts* as if the intentionalist discourse is ultimately complete, coherent and convincing,' Mark G Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 Stanford Law Review, 591 (original emphasis).

## **A. Liberal Principles and the Figure of the Autonomous Individual**

The liberal conception of the individual as an autonomous, rational, and ultimately asocial figure flows from philosophical ideals of freedom and justice, as seen in particular through the example of Rawls' theory of veil of ignorance.<sup>4</sup>

### **1. Liberal conceptions of justice and the figure of the individual**

Liberal philosophy was developed in the moral and intellectual context of enlightenment in which the 'key conception was that the social world was founded upon individual self interest and right.'<sup>5</sup> This approach placed the free individual at the centre of all aspects of life, be it moral, political or legal. In order to identify and distinguish the notion of 'right' as superior and prior to that of 'good', liberal philosophy seeks to isolate core interests held to define human nature and requiring protection. The figure of the individual plays a central role in this inquiry, the smallest common denominator within which to locate these core interests and helping to limit the restrictions that may be imposed in the name of justice. The liberal ideal of freedom is, at heart, an asocial concept, not dependent on any particular political or social setting<sup>6</sup>

In its most advanced metaphysical form, values of autonomy and self-ownership which define the liberal individual serve to regulate both the amount of interference that can be imposed and how further rights are obtained. In this vision of liberalism,

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<sup>4</sup> As developed in John Rawls, *A Theory of Justice*, (Belknap Press of Harvard University Press 1971), see below, text to n 9 for more details.

<sup>5</sup> Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press 2001), 17.

<sup>6</sup> In fact, it can be 'enjoyed outside society as well as within,' according to John Braithwaite and Phillip Pettit, *Not Just Deserts* (Clarendon Press 1990), 56; discussing how Hobbes saw individual freedom as being just as achievable in the context of a tyrannical or fascist regime as it would be in a democracy. In this work, the authors refute this particular conception of freedom in favour of the concept of dominion, a social concept based on republican political theory, which embraces a holistic view of individual nature; the work of Braithwaite and Pettitt on the concept of dominion is discussed in more details below, see text to n 98.

social relationships are not considered goals in the pursuit of right over good—they are mere by-products of the choices and decisions an individual may make. Pushed to its extreme, this vision of the asocial autonomous individual leads to a system where self-ownership and the protection of autonomy and privacy represent the guarantor of an individual's core interests. According to Nozick, who embraced this more extreme version of liberalism, the role of the state is limited and focused on the existence and upkeep of a free market for all.<sup>7</sup> Any state intervention must be exclusively justified in relation to the protection of specific individuals' rights, and their freely acquired property, to the exclusion of any consideration for a common or more generalised version of the good.<sup>8</sup>

## **2. From Rawls' veil of ignorance to the liberal 'fear of the social'**

Without adopting such extreme metaphysical conclusions, other theories of justice use the figure of the isolated autonomous individual as their cornerstone. Rawls' theory of justice is arguably the best known and most relevant.

Starting from relatively non-contentious statements about what is just or true, Rawls takes his reader through what he calls a 'reflective equilibrium'. The conclusion of this intellectual journey is that there is only one conception of justice or right, from which various equally valid conceptions of the good can emerge. In this search for an acceptable theory of justice, Rawls' contribution to liberal philosophy is the concept of the 'veil of ignorance', which forms the basis of an empirical alternative to more metaphysical perspectives on liberal philosophy.<sup>9</sup>

The object of the veil of ignorance is to provide a setting in which all individuals come to the same decisions regarding what can be considered good, and to establish a

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<sup>7</sup> This theory is an extreme example of the liberal focus on the figure of the individual and his autonomy and freedom in particular, which even goes so far as rejecting any possible trade-off in consideration of any common or more generalised conception of the 'good'. See Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974).

<sup>8</sup> The object of Nozick's political philosophy is not a theory of justice as such, but rather a metaphysical determination of human nature and how best to protect it.

<sup>9</sup> In particular the Kantian reliance on individual rational choice as the foundation for justice, constituting the core of a 'rational and metaphysical philosophy,' Norrie *Crime Reason and History* (n 5), 17.

process following which all agreed principles would be just.<sup>10</sup> Once an individual is placed behind the veil of ignorance, he adopts what Rawls calls the 'original position', where he is ignorant of his circumstances in life, in order to neutralise all specific characteristics which he or she might be tempted to use to their advantage.<sup>11</sup> In this hypothetical situation, any individual placed behind that veil of ignorance would inevitably choose what is right over what is good for his own self, as he or she ignores what 'good' would be in practice.<sup>12</sup> From this mental experiment flows the idea of justice as 'fairness', based on the imaginary consensus of individuals in the 'original position'.

According to Rawls, two principles emerge in this consensus. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.<sup>13</sup>

Although Rawls rejects claims that his theory of justice as fairness is based on metaphysical claims about human nature, it is still indissociable from a particular vision of the nature of the individual as a subject.<sup>14</sup> From the perspective of this work, the crucial finding is the liberation of the individual self from any moral meaning stemming from the universe, including any interactions with others surrounding him. Rawls takes as a starting point the individual in the amoral original position, making its own meaning of what is 'right' by logical or rational construction and of what is 'good' by moral choice and consideration. Hence, while the notion of 'good' can and indeed will almost always include considerations of social welfare or the satisfaction of desires, an individual's right to equal liberty will take primacy over it. Rawls explicitly recognises this dual objective, but ultimately takes the position that the normative concept of

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<sup>10</sup> Rawls (n 4), 136.

<sup>11</sup> *ibid.*

<sup>12</sup> Individuals in this position therefore lack any particular definition and 'do not know how the various alternatives will affect their own particular case;' the only 'particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies;' *ibid.*, 137, including a more detailed list of what individuals in the original position know and don't know.

<sup>13</sup> *ibid.*, 60.

<sup>14</sup> Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Wiley-Blackwell 1996), 10, 46; referring to Rawls' acceptance that 'the essential unity of the self is already provided by the conception of the right,' in Rawls (n 4), 563.

justice, while allowing for the value and goodness of community and association, remains individualistic at its core.<sup>15</sup>

The figure of the asocial individual must therefore come first and above any consideration of community and socialisation, from a moral, but also epistemological point of view, in order that the self be truly 'prior to the ends which are affirmed by it.'<sup>16</sup> Within this opposition between the notion of good and right, the figure of the autonomous individual remains the core principle that prefigures which is which. According to Rawls, an acceptable theory of justice can only be identified through the abstraction of external factors and social interactions. This approach illustrates the core of liberal theory, and its focus on the isolated figure of the individual as an asocial, independent and autonomous being.

This focus is also characteristic of a wider perspective in liberal legal theory, which sees the centrality of the asocial individual as crucial to any consideration of justice and freedom. Ultimately, this approach leads to an emphasis on the value of equality within the law: if the asocial autonomous individual is the starting point of any conception of justice, then the law must seek to protect individuals' freedom and autonomy above all else. In doing so, it must also treat all individuals equally. Equality can take many forms in its liberal interpretations, but ultimately relies on the promise of similar treatment for all, in the hope of creating a level playing field.<sup>17</sup> In the criminal law, this search for formal equality translates into a range of values and principles collectively defined as the rule of law, 'conducting to a situation in which the rational, responsible individual is free to plan her life so as to avoid as far as possible the coercive intervention of the criminal law.'<sup>18</sup> This perspective sees the recognition of

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<sup>15</sup> Rawls (n 4), 264; he even goes so far as claiming that 'even though justice as fairness rests on an individualistic foundation,' it provides 'a central place for the value of community,' although the nature of that community relationship has been questioned as being too focused on unanimity as a social goal and paradoxically leaving little room for human individuality; David Lewis Schaefer, *Illiberal Justice: John Rawls vs the American Political Tradition* (Univ. of Missouri Press 2007), 112, referring to Rawls (n 4), 232-3.

<sup>16</sup> Rawls (n 4), 560.

<sup>17</sup> See Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1994), 148-9 for a list of the various liberal interpretations of the principle of equality, which includes, but is not limited to, 'equal consideration of interests', 'equality of welfare', 'equality of resources' or 'equality of opportunity'; the main criticism of this concept of 'equality' relates to the lack of examination or recognition of substantive equality over formal equality.

<sup>18</sup> Lacey *State Punishment* (n 17), 149.

social relationships as a threat to the principle of neutrality of justice and the primacy of the right over the good.

The following section will explore in greater detail how this atomistic view of the responsible individual and its corresponding ideal of justice and freedom are reflected in the criminal law.

## **B. Liberal Individualism and Criminal Liability: Defining the Figure of the Responsible Individual**

The first part of this section will address the traditional paradigm of criminal liability and its conception of the responsible individual. The second will show how despite a more nuanced and objective characterisation in recent years, the figure of the responsible individual in criminal liability remains defined by the asocial figure of the autonomous individual.

### **1. Criminal liability and the asocial individual: limiting the scope and depth of the criminal law**

The traditional model of criminal liability is shaped by an individual's relationship with other autonomous individuals, mediated by the state. As such, it generally takes an atomistic and isolated view of individual behaviour when determining liability. This can be seen in two of the defining characteristics of criminal liability: the harm principle and the reliance on orthodox subjectivism. The former accounts for a limitation on the scope of the criminal law, preserving individuals' autonomy when determining what behaviour will be deemed criminal, while the latter limits the depth of the criminal law, restricting it to subjective considerations of guilt.

The following section explores how criminal liability has evolved to reflect an asocial and isolated perspective of individual behaviour. In the second part, more complex and conflicted aspects of criminal liability are presented. These are not intended to be an exhaustive account of the entire body of rules which make up criminal law, but aim to present how a more nuanced depiction of the responsible



individual foreshadows the model of community-based liability developed in the latter part of this chapter.<sup>19</sup>

**a)      *Limiting the scope of criminal liability – the harm principle***

The purpose of the criminal law is to regulate individual behaviour in society, in order to protect individuals' interests.<sup>20</sup> As a result, the state imposes restrictions on the behaviour of its subjects within a limited framework of acceptable interference with individual autonomy and freedom. One of the limits imposed on the criminal law to preserve these interests is contained in the harm principle, which restricts the type of behaviour which can give rise to criminal liability. This principle finds its origins in Mill's assertion that 'the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.'<sup>21</sup> This principle was then reformulated by Feinberg to suggest that the state can only impose the criminalisation of conduct if it causes or unreasonably threatens to cause serious private harm.<sup>22</sup> Here, harm comprises any significant setbacks to individuals' interests, or a 'harmed condition' affecting those interests.<sup>23</sup>

The harm principle relies on the recognition of a private sphere surrounding each individual and considered worthy of protection from interference. The hard consequences of a criminal conviction call for clear and effective safeguards to protect the interests of individuals, constructed as isolated figures whose autonomy must be preserved above all. Within criminal liability, the harm principle provides a balancing framework between the competing interests of an individual's freedom to act as he will (the private sphere), and the interests of other individuals surrounding him to act as they will (the public sphere). Liability will be imposed when the defendant's actions

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<sup>19</sup> See for example, Norrie's work on the contradictions at the heart of the criminal law, as developed in *Crime, Reason and History* (n 5), and Alan Norrie, *Punishment, Responsibility and Justice* (OUP 2000), and Lacey's work on the Responsible Subject and responsibility in the criminal law: Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *The Modern Law Review*, 350.

<sup>20</sup> The functional role of the criminal law and its focus on 'prohibiting' behaviour was discussed in chapter 1, see text at n 60.

<sup>21</sup> John Stuart Mill, *On Liberty* (J.W. Parker, 1859), 13-14.

<sup>22</sup> Joel Feinberg, *The Moral Limits of the Criminal Law – vol.1 Harm to Others* (OUP 1987), 11.

<sup>23</sup> *ibid*, 31-36.

harm the interests of others around him.<sup>24</sup> The liberal value of neutrality and right over good is therefore preserved by the idea that an individual's autonomy can only be restricted where its exercise, in turn, infringes others' autonomy. From that limiting principle stems the positive idea that 'the state has a proper interest in preventing conduct that infringes others' rights or that harms or threatens their legitimate interests.'<sup>25</sup>

The harm principle also functions as an external limit on the criminal law, determining what behaviour can be regulated based on competing interests of individuals interacting in society.<sup>26</sup> This balancing exercise is carried out by determining which interests require protection within the context of individual autonomy, and has led to the creation of a range of offences such as murder, rape, theft, or criminal damage. Each offence represents a different aspect and sometimes combination of the interests protected: physical, psychological or material interests.<sup>27</sup>

The scope of the criminal law is ultimately premised on the interests of the individual, both in his capacity as the responsible agent and as the injured (or potentially injured) party. The relationship which forms the basis of responsibility in this context is that between individuals as isolated asocial figures, defined by their autonomy according to liberal principles. The actual relationship, including the more complex interactions which may exist between those individuals, is not taken into account when determining the nature of responsibility and the liability which stems from it: these interactions merely give context to a situation or action which give rise to liability. Criminal behaviour is criminal because it involves a harmful interaction between two or more individuals: A kills B, sexually assaults C or steals from D. According to the liberal paradigm of criminal responsibility, an individual's relationship with his victim is independent of the nature of his responsibility conceptually. That B is

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<sup>24</sup> As long as he chose to commit such acts and was therefore responsible, according to the notion of subjective responsibility, as will be presented in the following section.

<sup>25</sup> R A Duff, *Punishment, Communication and Community* (OUP 2001), 36.

<sup>26</sup> Dennis Baker, 'Constitutionalizing the Harm Principle', (2008) 27(2) *Criminal Justice Ethics* 3 puts forward a defence of a strong constitutionalised version of the harm principle as a limit on criminalisation.

<sup>27</sup> Other principles of criminalisation are also recognised by Feinberg, justifying for example the criminalisation of offensive conduct or the reliance on paternalism to criminalise, but these are held as subsidiary principles and do not represent the core of the criminal law. These are developed in later volumes of the *Moral Limits to the Criminal Law* collection (OUP): *vol.2 – Offense to Others* (1988), *vol.3 – Harm to Self* (1989) and *vol.4 – Harmless Wrongdoing* (1990).

A's mother, that C is married to A, or that D is A's abusive boss does not affect the core principle of A's responsibility, even if it may affect a trial process and mitigate or aggravate punishment.<sup>28</sup>

Criminal liability is, therefore, specifically aimed at regulating the relationship between individuals as independent figures, whose respective pursuit of freedom causes them to interfere with each others' interests. In order to balance the interests of these individuals, the criminal law stipulates which interests will be protected from interference and what kind of behaviour will lead to liability.<sup>29</sup> This particular account of the relationship underlying criminal liability also informs another existing limit on the criminal law, as will be presented in the following section.

### ***b) Defining the responsible individual: from character to capacity and orthodox subjectivism***

The liberal figure of the asocial autonomous individual also features prominently in criminal liability's approach to the notion of guilt and responsibility. The determination of guilt in the criminal law has shifted over the last century from an essentially moral and objective notion to a subjective investigation of the responsible individual's mind.<sup>30</sup> Instead of relying on his moral character, an individual's agency and capacity is examined to determine his criminal liability,

Historically, criminal liability was essentially a question of morality, and the criminal trial functioned 'on the basis of lay evaluation of normative, character-based—rather than subjective or psychological—evidence and assumptions about the individual defendant.'<sup>31</sup> The responsible individual was considered as a person of

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<sup>28</sup> As with most principles there are exceptions to this rule, for example with the creation of statutory offences premised on the existence of a special relationship between the defendant and the victim, as with sexual offences committed by a person in a position of authority, see for example the Sexual Offences Act 2003, ss 16-24 regarding abuse of position of trust; the essential principle regarding the relational nature of criminal liability is not affected by these exceptions.

<sup>29</sup> This simplified interpretation of the harm principle in the context of criminal liability has been challenged from a normative perspective as under-inclusive, although it remains a relevant representation of the core principles of the criminal law; Duff *Answering for Crime* (n 1), ch 6 and 123-146.

<sup>30</sup> For a more extensive discussion of this shift, see Norrie *Crime Reason and History* (n 5), Lacey 'In Search of the Responsible Subject' (n 19), and Peter Ramsay, 'Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *The Modern Law Review* 29-58.

<sup>31</sup> Lacey 'In Search of the Responsible Subject' (n 19), 361.

either good or bad moral character, and the relational nature of liability was focused on the relationship between that individual and the rest of society, to determine whether the defendant could be reformed and reinstated as a valid member of society.<sup>32</sup>

From this character-based theory of liability, which defines the responsible individual according to his moral worth and general potential for causing harm to society, the criminal law has shifted its focus towards individual justice and liberal political philosophy has informed its practical application.<sup>33</sup> This shift has been characterised by the elaboration of a general part of criminal liability, mainly in the second half of the 20<sup>th</sup> century,<sup>34</sup> based on the foundational principle of doing justice to individuals.<sup>35</sup>

The influence of liberal principles of individual justice is perhaps best embodied in the prominence of the concept of 'orthodox subjectivism',<sup>36</sup> which is:

founded on the political values of individualism, liberty and self-determination: maximum freedom from state interference and coercion is desirable to enable individuals to choose their life plans and to pursue their own conceptions of the good.<sup>37</sup>

Pursuant to this principle, the law is deemed to address the individual as a rational being, capable of free will and rational thought and worthy of respect.

In practice, orthodox subjectivism in the criminal law can be seen in the 'simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.'<sup>38</sup> In *Punishment and Responsibility*, Hart extrapolated from the theory of individualism a subjective account of criminal liability, which has become one of the leading theories on the issue. By this account, the ability of an individual to make reasoned decisions about himself and his

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<sup>32</sup> Lacey *State Punishment* (n 17), 362.

<sup>33</sup> The criminal law can even be said to have become, 'at its heart, a practical application of liberal political philosophy,' Norrie *Crime Reason and History* (n 5), 10.

<sup>34</sup> The concept of a 'general part' in the criminal law can be attributed to Glanville Williams, in his textbook, *Criminal Law: The General Part* (Stevens & Sons 1953), but others have also contributed to its development. For a quick historical account of its development, see Ian Dennis, 'The Critical Condition of the Criminal Law' (1997) 50(1) *Current Legal Problems*, 213.

<sup>35</sup> Norrie *Crime Reason and History* (n 5), 10.

<sup>36</sup> The term was coined in R A Duff, *Intention, Agency and Criminal Liability* (OUP 1990).

<sup>37</sup> Dennis (n 34), 237.

<sup>38</sup> HLA Hart, *Punishment and Responsibility*, (2<sup>nd</sup> ed, OUP 1968), 181.

relation to others came with an inherent responsibility as to his choices, good or bad. The corollary to the negative principle that the law's penalties and criminal liability ought not to be applied unless an individual has the capacity and a fair opportunity to make a choice as to his behaviour is that those penalties should in fact be applied to the majority of individuals who have the opportunity to make an enlightened choice about their actions.

A liberal and subjective approach to criminal liability therefore restricts the application of punishment to those who have exercised some choice in their action, and prevents punishment in the absence of choice.<sup>39</sup> In practical terms, this is translated in the *mens rea* requirement of most criminal offences, which represents the evidence of a 'guilty mind' or the exercise of a choice in the carrying out of a particular act, and is characterised by the use of intention or subjective recklessness as hallmarks of liability.

Although the absoluteness of subjectivism can in practice be questioned,<sup>40</sup> it represents the core principle which establishes the concept of individual responsibility. In fact, the principle of orthodox subjectivism as developed by Hart has been so influential that it appears to have created a presupposition of freely chosen actions in the criminal law when determining individual capacity and liability.<sup>41</sup> Because this account of individual responsibility is so widely accepted, criminal liability is frequently decided by the examination of an individual's subjective state of mind, and in particular a determination of whether an individual did in fact *choose* to behave in the way that led him to commit a criminal offence.<sup>42</sup>

Criminal liability is therefore 'in a sense the most direct expression of the relationship between a state and its citizens.'<sup>43</sup> While this relationship can be characterised as more or less socialised, it remains focused on the position of the

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<sup>39</sup> *ibid.*

<sup>40</sup> See below, s IB2a-b.

<sup>41</sup> Lacey *State Punishment* (n 17), 63.

<sup>42</sup> The fact that, in practice, the subjective character of criminal liability is often watered down does not necessarily undermine this conception of individual responsibility. Objective criteria of *mens rea* such as 'reasonableness' and the use of strict liability in the criminal law still ultimately rely on the figure of the responsible individual as autonomous and capable of making choices, albeit a fictional version of that individual.

<sup>43</sup> Dennis (n 34), 247; the argument is made in relation to the existence of a 'criminal code' specifically, but is applicable to the more general concept of criminal law; this point is also discussed in Ramsay (n 30).

individual as a member of the polity.<sup>44</sup> The person held responsible by the criminal law is the same autonomous and rational person whom it is designed to protect. In a liberal context, this person's liability is considered in isolation from his social context and interactions.<sup>45</sup>

As we will see in the next section, this account of the relationship which informs criminal liability has been challenged, both in theory and in practice.

## **2. Pure subjectivism and beyond: preserving the liberal figure of the individual in criminal liability**

In practice, there are instances in which the criminal law is designed to take into account the socialised nature of the individual. Primary examples include the interpretation of the concept of intention, and the use of reasonableness and strict liability. But as this section will demonstrate, even where standards of individual responsibility are not strictly subjective, core principles of liberal individualism are still present in the determination of liability. The responsible individual is still considered an isolated autonomous figure (albeit a fictional one) and the basis of responsibility remains determined by his relationship and interactions with other autonomous individuals.

### ***a) The dilution of subjectivism in the criminal law***

As discussed, subjectivism is generally presented as the archetypal principle of individual responsibility, and the core value of individual justice according to orthodox subjectivism.<sup>46</sup> In practice however, orthodox subjectivism does not represent the full reality of criminal liability and fails to account for many developments within the law. Objective standards of *mens rea*, the use of strict liability and the proliferation of

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<sup>44</sup> Duff in particular adopts a more socialised vision of the criminal law and refers to it as the 'common law' regulating the behaviour of individuals as citizens of a particular polity. As such, the role of the state itself would be limited to how that polity is defined from a political and social perspective – Duff himself advocates a liberal-republican perspective in *Answering for Crime* (n 1).

<sup>45</sup> According to Kelman, the criminal justice process takes a broad or narrow view of an individual's intention and identity when considering his liability, whether consciously or unconsciously; Kelman (n 3).

<sup>46</sup> Ramsay (n 30), 33.

regulatory offences are all notable exceptions. By relying on objective standards of acceptable behaviour, these examples introduce a degree of contextualisation and socialisation within the determination of criminal liability.

This shift has been analysed from a historical, political and social perspective.<sup>47</sup> Whether characterised as a resurgence of the character theory of responsibility, the influence of the evolution of the model of citizenship from a political to social incarnation<sup>48</sup> or a shift in the state's function in how it approaches the issue of criminalisation,<sup>49</sup> it is clear that in practice, the criminal law relies on multiple conceptions of responsibility. According to Lacey, these emerge as 'responses to structural problems of coordination and legitimation faced by systems of criminal law,'<sup>50</sup> and reflect overlapping principles of capacity, character and outcome.

A complete account of the overarching principles of responsibility would require a complex examination of the criminal law, including processes and practices.<sup>51</sup> Yet at a more superficial level, the way in which the different principles overlap can be seen as the expression of the competing demands of individual justice and social context, and shows the increasing contextualisation of criminal responsibility. 'Intention' in the context of homicide law provides a striking example of this contextualisation. To hold someone liable for murder, the prosecution must prove that he had the 'intention to kill or cause grievous bodily harm.'<sup>52</sup> Throughout a succession of cases where the defendant claimed not to have in fact intended certain consequences of his actions, the courts have shied away from providing a cognitive definition of intention.<sup>53</sup> They have relied instead on the ordinary meaning of the word and provided a more nuanced

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<sup>47</sup> For further works on the question, see above, n 30.

<sup>48</sup> Alan Norrie, 'Citizenship, Authoritarianism and Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance* (Hart 2009).

<sup>49</sup> See Andrew Ashworth and Lucia Zedner, 'Defending the criminal law: Reflections on the changing character of crime, procedure and sanctions' (2008) 2 *Criminal Law and Philosophy* 21.

<sup>50</sup> Nicola Lacey, 'Space, time and function: intersecting principles of responsibility across the terrain of criminal justice' (2007) 1 *Criminal Law and Philosophy* 233, 246.

<sup>51</sup> These are listed as 'legislation, policing, prosecution, plea-bargaining, judicial and jury decision-making on questions of both liability and sentence while attending to the specificities of responsibility attribution at each stage,' *ibid*, 235.

<sup>52</sup> The definition of murder is generally attributed to Coke who stated that 'Murder is when a man [...] unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice aforethought [...]' *Co Inst*, pt III, ch 7, 47; The role of the subjective mens rea requirement is particularly important in this case as it will determine whether the individual is found guilty of murder or of the lesser offence of manslaughter.

<sup>53</sup> See in particular *R v Hyam* [1975] A.C. 55, *R v Moloney* (1985) 1 AER 1025, and *R v Woollin* [1999] 1 A.C. 82.

approach to the subjective concept. A jury is now 'entitled to find intention'<sup>54</sup> from evidence that the defendant foresaw the consequences as 'virtually certain consequences.'<sup>55</sup>

This effectively gives the jury licence to take a moral approach to the determination of the existence of responsibility and draw from the wider context of the action.<sup>56</sup> As such, it arguably widens the subjective and cognitive perspective on intention. In the case of *Hyam*, a scorned lover poured petrol through a letter box to frighten her new rival, resulting fire in a fire that caused the death of a fifteen-year-old girl.<sup>57</sup> In a liberal and purely subjective vision of criminal responsibility, a finding of intention would be based solely on whether the defendant had in fact intended to kill or cause grievous bodily harm. However, it is not difficult to imagine how the details of the case could affect a jury's assessment of the defendant's view of the consequences as virtually certain (and therefore intended). In this case, this approach leaves room to find the revengeful scorned lover liable for the terrible consequences of her callous behaviour and mitigates the liberal principles of subjectivism as the basis for liability.

Mitigation of subjective principles is also present in the development of the defence of provocation in criminal law. This defence was reformed in the face of criticism following the conviction of women who killed their abusive partners, to include better consideration for the social context of the crime, and the psychological state of the defendant in this particular situation.<sup>58</sup> The defence of provocation aims to provide mitigation in cases where the core principles of subjectivism prove potentially too harsh, and allows for some adjustments in the interest of fairness.

According to Norrie, these examples illustrate a tension between the psychological and legal concepts of individualism and their role in the adjudicating decision in a criminal trial.<sup>59</sup> The principles of liability rely on the fiction of a responsible individual

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<sup>54</sup> *Woollin*, *ibid*.

<sup>55</sup> *R v Nedrick* [1986] 1 WLR 1025 and *Hancock and Shankland* [1986] AC 455

<sup>56</sup> The term 'moral elbow room' was coined to refer to this idea in Jeremy Horder, 'Intention in the Criminal Law: A Rejoinder' (1995) 58(5) *The Modern Law Review* 678.

<sup>57</sup> *Hyam* (n 53).

<sup>58</sup> See for example the cases of *R v Ahluwalia* [1992] 4 All ER 889, *R v Thornton* [1992] 1 All ER 306, *A-G for Jersey v. Holley* [2005] 3 WLR 29, and their discussion in Aileen McColgan, 'In Defence of Battered Women Who Kill' (1993) 13(4) *OJLS* 508; more recently, the defence of provocation has recently been reformed into the new partial defence of loss of control by the Coroners and Justice Act 2009, ss 54, 55 and 56.

<sup>59</sup> Norrie *Crime Reason and History* (n 5), 29.



evolving in 'a universe of equally responsible individuals, regarded in isolation from the real world, the social and moral contexts in which crime occurs, of which they are a part.'<sup>60</sup> Yet in each case, a unique individual emerges to be judged, with a multitude of factors providing context to the act in question. This tension subverts the principles of liberal subjectivism, and can create situations where cases are decided according to socio-political considerations in order to reach the right legal conclusion.<sup>61</sup>

These outcomes provide a mechanism for redress which is effective on a case-by-case basis, yet doesn't meaningfully challenge the liberal focus on the asocial autonomous individual at the heart of criminal liability.

***b) 'Reasonableness' and objective standards of liability: preserving the figure of the responsible individual***

The core principle of subjective liability is further challenged by the increased use of the 'reasonableness' standard, which determines responsibility objectively, according to what an ordinary or reasonable person would do or consider. Manslaughter by 'gross negligence'<sup>62</sup> and the development of the concept of honesty in relation to property offences<sup>63</sup> typify this approach. Instead of relying on a 'guilty mind' or subjective fault when finding liability, these rely on objective standards of behaviour against which to judge the defendant. Failure to conform to the requirements can result in the imposition of criminal liability, irrespective of whether the defendant actually meant to cause harm or was aware of a risk of causing harm. A more extreme version is the use of strict liability, where causing a particular outcome, irrespective of any particular state of mind, subjective or objective, is sufficient to give rise to liability.<sup>64</sup>

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<sup>60</sup> Norrie *Crime Reason and History* (n 5).

<sup>61</sup> Alan Norrie, 'Historical differentiation, moral judgment and the modern criminal law' (2007) 1 *Criminal Law and Philosophy* 251, 256.

<sup>62</sup> *R v Adomako* [1994] 2 All ER 79 HL.

<sup>63</sup> As set out in *Ghosh* [1982] Q.B. 1053, also see Lacey 'Space, time and function' (n 50), 241 for a list of more examples of the increased use of reasonableness liability in the criminal law.

<sup>64</sup> For a recent discussion of the notion of strict liability, see Jeremy Horder, 'Whose Values Should Determine When Liability is Strict', and A P Simester, 'Is Strict Liability Always Wrong', in A P Simester (ed), *Appraising Strict Liability*, (OUP 2005).

Still, while they may move beyond the subjective principles of liability, strict and reasonableness liability do not necessarily challenge the centrality of the isolated figure of the responsible individual. Both modes can be interpreted as a resurgence of character-based liability, moving away from the subjective capacity theory and judging the individual according to objective standards of good behaviour.<sup>65</sup> In doing so, they rely on a fictional figure of the autonomous individual, one who is deemed to accept and embrace the standards of behaviour of society in general.

In both cases, it is presumed the individual in question is, in theory at least, an autonomous and rational individual, and his behaviour can be judged against objective standards of behaviour, as decided by the law or the court.<sup>66</sup> In fact, the use of the reasonableness requirement can be seen 'merely ... as an evidentiary mechanism', designed to illustrate a specific defendant's state of mind (or lack thereof, when the requirement is one of indifference or lack of consideration for a particular risk).<sup>67</sup> The use of objective reasonableness as a standard of criminal liability dilutes the influence of liberal principles, but the liberal figure of the asocial autonomous individual still remains at the heart of the relationship on which responsibility is based.<sup>68</sup>

## **II. Community and the Socially Constituted Individual: a Different Perspective on Individual Responsibility**

Beyond the ways in which liberal individualism has influenced the criminal law, the second part of this chapter will examine a different conception of individual responsibility as the basis for an alternative model of liability, which situates the responsible individual in the context of his relationship with a particular community.

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<sup>65</sup> Lacey 'In Search of the Responsible Subject' (n 19) and Norrie *Crime Reason and History* (n 5).

<sup>66</sup> In the case of reasonableness liability, this standard is decided jointly by the jury or the judge, whereas in strict liability, the standard is explicitly decided by the state legislating on the issue.

<sup>67</sup> Lacey 'Space, time and function' (n 50), 242-3; referring to the case of *DPP v Morgan* [1976] AC 182 and the mens rea of rape.

<sup>68</sup> This shift in approach has been recognised in relation to strict liability as representing an alternative 'welfare paradigm', which embraces the idea of a 'better realised individual freedom' as the justification of strict liability; Alan Brudner, 'Agency and Welfare in the Penal Law', in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Clarendon Press 1996).

## **A. Communitarianism and Social Relations: Redefining the Figure of the Individual**

This section will build on communitarian principles to proffer a figure of the responsible individual—one who is inherently shaped by his social interactions but does not relinquish individual autonomy—representing a new, and valid actor for a model of community-based liability.

### **1. The communitarian challenge to liberalism: towards a different vision of the individual**

The communitarianism movement began in reaction to the perceived failures of liberal individualism, and is premised on the recognition of the value and centrality of an individual's capacity for social interactions.<sup>69</sup> The communitarian challenge to the liberal ideal has taken different forms. Beyond the normative claims central to many of those theories, communitarianism rests on a methodological challenge which effectively situates the individual self within his social context and interactions as constitutive of his nature.<sup>70</sup>

This section will examine the normative claims of the communitarian movement and how they differ from liberal principles, through which the ultimate, ontological claim of communitarianism may be best understood.

#### ***a) Communitarianism and liberalism: the normative challenge***

Although the concept of community has played a prominent role in political thought for many centuries,<sup>71</sup> communitarianism as a movement only truly appeared

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<sup>69</sup> See Mulhall and Swift (n 14) and Shlomo Avineri and Avner de-Shalit, *Communitarianism and Individualism* (OUP 1992).

<sup>70</sup> The distinction between methodological and normative challenge was taken from Avineri and de-Shalit, *ibid.*

<sup>71</sup> In his *Politics*, Aristotle observed that 'Since we see that every city-state is a sort of community and that every community is established for the sake of some good (...), it is clear that every community aims at some good, and the community which has the most authority of all and includes all the others aims

in the 1980s. It first emerged through the work of philosophers such as MacIntyre,<sup>72</sup> Sandel<sup>73</sup> and Walzer,<sup>74</sup> and has more recently been developed in a more pragmatic political vein, for example by Etzioni<sup>75</sup> in the United States and Giddens<sup>76</sup> in the United Kingdom. The movement arose in reaction to liberalism, and from a normative perspective, challenges liberalism's philosophy of liberation. It affirms a new morality, not based on the protection of individual autonomy and rational choices, but rather on the promotion of the primacy of social interactions and the value of community.

As such, communitarianism claims to reinstate the value of fraternity alongside its original bedfellows, liberty and equality, and aims to construct a communitarian morality as an alternative to liberal neutrality.<sup>77</sup> MacIntyre's philosophy, for example, advocates a moral understanding of an individual's relationship with his community, and sees that relationship as integral to any vision of the good.<sup>78</sup>

From a more political perspective, the communitarian movement also questions the concept of right and its corollary of neutrality, as outlined in the previous section. Those two perspectives are interlinked and often developed in concert, pitting liberalism's focus on the private sphere against a renewed interest in the public sphere. The former, illustrated in the concepts of liberty and individualism, as well as strong institutions for the protection of freedom, is opposed by a communitarian call for tradition and community values, which can be found, for example, in church or family.<sup>79</sup> The centrality of community to individuals' nature and identity, as well as its position as the source of moral good, makes it a value to be preserved and enhanced.<sup>80</sup>

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highest, that is, at the good with the most authority', I.1.1252a1–7; see also Richard Kraut, *Aristotle – Political Philosophy*, (OUP 2002), s 9:22.

<sup>72</sup> Alasdair MacIntyre, *After Virtue: a study in moral theory* (Duckworth 1981).

<sup>73</sup> Michael J Sandel, *Liberalism and the Limits of Justice*, (Cambridge University Press 1982).

<sup>74</sup> Michael Walzer, *Spheres of Justice: a defence of pluralism and equity* (Robertson 1983).

<sup>75</sup> Amitai Etzioni, *The Spirit of Community : the Reinvention of American Society* (Crown Books 1993) and *The New Golden Rule : Community and Morality in a Democratic Society* (Basic Books 1998).

<sup>76</sup> Anthony Giddens, *The Third Way : The Renewal of Social Democracy*, (Polity Press 1999).

<sup>77</sup> Whether communitarianism represents truly an alternative or even a necessary qualification to liberalism in moral and political terms is a question of debate, see Simon Caney, 'Liberalism and Communitarianism : a Misconceived Debate' (1992) 40(2) *Political Studies* 273; Walzer has also argued that communitarianism is destined to be a reactionary periodic movement, regularly righting the course of liberal philosophy, but never becoming a fully fledged alternative in 'The Communitarian Critique of Liberalism' (1990) 18(1) *Political Theory* 6; this work is discussed below at n 92-93.

<sup>78</sup> MacIntyre (n 72).

<sup>79</sup> This call for a communitarian morality to counter liberal neutrality was particularly developed in the work of Etzioni, who emphasises the importance of community over autonomy from a political perspective; for example: Amitai Etzioni, 'The Responsive Community: A Communitarian perspective'

While this cursory account of the normative challenge is not comprehensive with regard to the complexity and diversity of analysis of the movement, it does highlight its fundamental principle: community is a moral and ethically positive concept which defines, challenges, or at the very least qualifies the liberal values of neutrality and justice. Whilst liberal principles can be related to the figure of the individual as an autonomous and rational being, communitarian principles are defined by a different vision of individual nature, as discussed in the next section.

***b) Communitarianism and liberalism: the methodological challenge and the need for a constitutive vision of social relations***

Communitarianism's methodological challenge to liberalism positions the individualist image of the self as ontologically false and ultimately artificial. At its core lies the principle that an autonomous, independent and ultimately a- or pre-social individual is not an appropriate starting point for any theory of justice. The individual is seen as intrinsically social and his social nature cannot be distinguished from his identity. Consequently, the liberal primacy of right, based on the protection of individual autonomy, over good, is seen as inherently flawed.

Some theories focus on the methodological challenge to liberal individualism, perhaps best embodied in the work of Michael Sandel, whose critique of Rawls' theory of 'justice as fairness' rests on a deconstruction of the deontological vision of the individual.<sup>81</sup> According to Sandel, the inadequacy of the pre-existing figure of the individual self is revealed by its lack of recognition of the surrounding community. Despite Rawls' claims that his focus on the individual does not detract from the importance of what brings a community of persons together, community relationships remain firmly in the domain of the good and represent only one of the many choices

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(Presidential Address, American Sociological Association, August 20, 1995) [1996] American Sociological Review 1.

<sup>80</sup> In fact, according to Etzioni, freedom of choice unchecked would lead to a diminution in autonomy and disorder in society. Moral order, emanating from the values of community is therefore needed to prevent individuals from acting in non-rational ways; this moral order is layered, and stems initially from the values of a particular community which apply to individuals, who are then 'additionally accountable' to 'society-wide values' which are typically regarded as constitutional; Etzioni *The New Golden Rule* (n 75), 224-225.

<sup>81</sup> Sandel (n 73).

that individuals in the 'original position' might make.<sup>82</sup> As such, according to Sandel, Rawls rejects any inter-subjective characterisation of the individual, and sees the identity of the self as completely distinct from any community or social interaction. Community is but one of the possible goals of individuals in the original position, but does not represent an integral part of their identity.<sup>83</sup> In Sandel's view, therefore, the flaw lies not so much in Rawls' veil of ignorance, but in the characterisation of the individual standing behind it. Rejection of community or 'commonality' as a defining element of individual selves rests on weak versions of the good of community, and takes a restrictive view of the subject.<sup>84</sup> This perception of social interactions rejects the notion of the community as constitutive of the individual self. Its failure to recognise the constitutive element of community in defining the individual self is at the core of this communitarian challenge to liberalism. Rawls' work thus 'locates the incompleteness of the liberal ideal.'<sup>85</sup>

This failure to recognise the importance of the 'social self' is further highlighted by Selznick in his critique of liberal philosophy. Although philosophers such as Dworkin and Rawls do show a communitarian sensibility,<sup>86</sup> they remain rooted in the principles of liberal individualism and autonomy and fail to recognise the true nature of the figure of the individual, in which social relations and the people we are related to define our identities. As MacIntyre argues, members of society identify as more than individual persons: they see themselves as part of a family, a citizen of a particular city or country, a member of a club, tribe or nation.<sup>87</sup> That people 'conceive their identity ... as defined to some extent by the community of which they are part' reflects the ontological value of community relations which 'describe not just what they *have* as fellow citizens, but also what they *are*.'<sup>88</sup> The rejection of the completely autonomous figure of the individual, and the call for the recognition of commonality and

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<sup>82</sup> Rawls (n 4), 192, see above, n 12.

<sup>83</sup> Sandel (n 73), 64.

<sup>84</sup> *ibid*, 148; according to Sandel, the good of community in that context is seen either as instrumental, where social arrangements represent a necessary burden for the cooperation of individual ends, or sentimental, according to which final ends are shared and cooperation is good in itself.

<sup>85</sup> *ibid*, 14.

<sup>86</sup> Philip Selznick, 'The Idea of a Communitarian Morality' (1987) 75 California Law Review 445, 446; this is also recognised in Etzioni 'The Responsive Community' (n 82), 3.

<sup>87</sup> MacIntyre (n 72), 220.

<sup>88</sup> Sandel (n 73), 150 (original emphasis).

interpersonal relations as a constitutive element of an individual's identity, represent the core premise and starting point of the communitarian challenge to liberal subjectivism.<sup>89</sup> The following section will present how this communitarian vision of the individual can form the basis for an alternative conception of the responsible individual who can be autonomous and yet concurrently defined by his social relations.

## **2. Communitarianism and responsibility: defining the 'socially responsible individual'**

According to communitarian philosophy, a figure of the individual defined by his social relations represents a valid starting point when determining liability, and creates an alternative figure of the socially responsible individual. By redefining the individual as an innately social being, communitarianism provides an alternate vision of the responsible individual, and starting point for a new model of liability, without undermining his autonomy. The first part of this section will examine how community relationships in the context of individual responsibility can help to re-qualify liberal principles of liability, without mutual exclusivity. The second part will expand on this to show that a figure of the responsible individual accounting for social context can exist, even while preserving individual autonomy.

### ***a) Communitarianism and liberalism: beyond the opposition***

Despite, or perhaps precisely because of, its genesis as a reaction to liberalism, communitarianism can be best understood as providing a qualification to the liberal ideal.<sup>90</sup> As Selznick argues, communitarianism cannot ignore the contribution of liberalism in constructing a society and legal system based on important political and philosophical values. By recognising this contribution, it can set out to reframe them in

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<sup>89</sup> It rests on a 'conception of human beings as integrally related to the communities of culture and language that they create, maintain and inhabit,' Mulhall and Swift (n 14), 162.

<sup>90</sup> The normative and methodological challenge that communitarianism represents for liberalism was discussed above, see text to n 70.

a system which embraces those values as well as that of community.<sup>91</sup> This complementarity arguably makes communitarianism a 'recurrent secondary part' of liberalism's lead role, placing the communitarian ideal as an essential part of developing a working liberal ideal, rather than a distinct morality destined to displace it.<sup>92</sup> In particular, it can provide a correction to liberalism's inclination towards instability and dissociation, by introducing a different perception of the individual self as a social being.<sup>93</sup>

In practice, liberal criminal theory does not account very well for this aspect of individual responsibility. As Norrie observes in his call for a relational theory of blame, punishment and blame are assigned to individuals as agents, but the agency which links those individuals with their social surroundings is generally disregarded by the criminal law.<sup>94</sup> This approach to liability ignores the fact that the responsible individual is in fact a member of society, and of the same community which is putting him on trial and finding him responsible.<sup>95</sup> A simple liberalism, which focuses on punishing responsible individuals, effectively ignores the moral truth of the 'communal responsibility' that communities bear for the crime of every individual.<sup>96</sup>

Furthermore, simple liberalism reinforces a traditional opposition, pitting the welfare and well-being of a particular individual (the wrongdoer) against that of the community. In consequence, recent alterations to the criminal law can be seen as failing to incorporate a:

properly communitarian moral outlook, which recognises that an individual's well-being depends significantly on the well-being of other members of her group and thereby recognises that an individual's well-being depends in part on the moral quality

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<sup>91</sup> Selznick (n 86), 463.

<sup>92</sup> Walzer 'Communitarian Critique of Liberalism' (n 77), 21.

<sup>93</sup> According to Walzer, communitarianism can teach 'the liberal selves to know themselves as social beings, the historical products of, and in part the embodiment of, liberal values,' *ibid*, 15.

<sup>94</sup> Norrie *Crime, Reason and History* (n 5), 221; this approach informs most of Norrie's work on the relational nature of blame, which portrays community as the context in which defendants can be held liable.

<sup>95</sup> In a response to Ashworth and Zedner (n 49), Cruft claims that liberal criminal theory is in fact 'insufficiently communitarian,' Rowan Cruft, 'Liberalism and the Changing Character of the Criminal Law: Response to Ashworth and Zedner' (2008) 2 *Criminal Law and Philosophy* 59, 60.

<sup>96</sup> Cruft considers this type of responsibility as 'conceptual rather than causal,' and argues for a 'shift towards more communitarian ways of thinking, a shift necessary in civil service language and cost benefit analyses, as much as in public discussion,' *ibid*, 64.



of her actions, and on whether the individual has been able appropriately to make amends for actions that wrong others.<sup>97</sup>

This relates to the idea of communal responsibility, but also highlights a more specific role of the concept of community in relation to the determination of individual responsibility, namely a general socialising role within which a fairer notion of individual responsibility can be constructed. In Braithwaite and Pettit's republican theory of criminal justice, the authors introduce the concept of dominion, and suggest it is the central value the criminal justice system should be seeking to promote and protect.<sup>98</sup> Dominion is based on a holistic perception of society and seen as the 'perfect liberty [which] will be a condition enjoyed so far and only so far as a person relates to other people, and to the institutions of his society, in a way which gives him a certain sort of power.'<sup>99</sup> In this approach, community offers a context in which an individual's action can be considered, as a way to mitigate the necessary isolation of liberal principles of liability. Dominion attempts to situate the individual in a wider social context when determining his rights, and suggests how community relationships may shape individual responsibility.

By examining the 'moral truth' of communal responsibility,<sup>100</sup> one can introduce a communitarian addition to liberal principles, recognise the role of community relationships within principles of criminal legal theory, and suggest reasons why individuals are to be held responsible for their actions in the context of their relationship with the wider community.<sup>101</sup> More importantly, it offers a different perspective on the individual whose responsibility will be engaged, introducing a figure of the responsible individual which is defined by his social context even while retaining his personal autonomy and capacity. As the following section will argue, an ontologically communitarian vision of the individual, which sees social relations as

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<sup>97</sup> Cruft (n 95), 60, referring to Duff *Punishment, Communication and Community* (n 25).

<sup>98</sup> Braithwaite and Pettit (n 6).

<sup>99</sup> *ibid*, 63; the power which flows from this holistic conception of perfect liberty relates to an individual's agency and autonomy.

<sup>100</sup> Cruft (n 95), 60.

<sup>101</sup> One aspect of this value relates to the fact that a 'political theory which acknowledged more firmly the inevitable social nature of human life would take a less stringent attitude towards the visiting of disadvantages upon persons in the expectation of fostering important social goals,' Lacey *State Punishment* (n 17), 164; other aspects relate to the communicative function of the criminal law, as discussed in particular by Duff *Punishment, Communication and Community* (n 25).

constitutive of a person's identity, is not necessarily antithetical to liberal principles of individual autonomy and does not deny that person's ability to make choices and be held accountable.

**b)      *The figure of the socially responsible individual***

In his account of a communitarian morality, Selznick provides alternative philosophical foundations for the notion of individual responsibility and counters the liberal philosophy of 'liberation' with the communitarian philosophy of 'belonging'.<sup>102</sup> The liberal figure of the responsible individual is characterised by his capacity to choose a course of action,<sup>103</sup> and subjective liability is determined accordingly, by observing his guilty mind in isolation to the social context of his behaviour.<sup>104</sup> Selznick counters by recognising the importance of responsibility as based on choice, but argues that choice need not be unconditional and should in fact 'flow from identity and relatedness', which characterise a person.<sup>105</sup>

Selznick proposes a vision of responsibility which flows specifically from the social context that subjective liability seeks to obscure. The communitarian individual is not absolved from responsibility because of any predetermination in his behaviour, but rather is recognised as responsible because of his existence within a particular social context. Duff also recognises the potential to combine communitarian and liberal principles in relation to individual responsibility, preserving the ideals of liberalism and the metaphysics of communitarianism in a normative theory.<sup>106</sup> His account of community, based on shared values and mutual respect and modelled on an ideal academic community, is designed to avoid the all-encompassing character that liberals fear.<sup>107</sup>

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<sup>102</sup> Selznick (n 86).

<sup>103</sup> The relationship between criminal liability and individual capacity for choice and fair opportunity was, as presented by HLA Hart, was discussed above, see text to n 38.

<sup>104</sup> Every action by definition will have a social context, and responsibility for it cannot be considered purely in abstraction from it. However, traditional criminal liability and liberal individualism approach this social context specifically from the perspective of individual autonomy rather than social relations.

<sup>105</sup> Selznick (n 86), 463.

<sup>106</sup> Even though he rests his views against liberalism on a metaphysical disagreement over the nature of social and human reality; see Duff *Punishment, Communication and Community* (n 25), 49-50.

<sup>107</sup> For more details, see below, text to n 150.

Duff argues for the existence of a 'liberal political community, a polity defined and structured by a shared commitment to such central liberal values as freedom, autonomy, privacy and pluralism, and by a mutual regard that reflects those values.'<sup>108</sup> The compatibility between liberalism and communitarianism is therefore, according to Duff, more than just a nod to the contribution and values of liberalism. Rather, his account of a communitarian criminal law seeks to redefine the starting point of liberal political philosophy, while preserving its normative framework. In this view, liberalism's fear of 'the social' rests on the opposition between the figure of the 'I' representing the individual, and that of the 'we' representing the community. 'I' forms an integral part of 'we', and is, in turn, defined by its belonging to that 'we', without relinquishing its capacity for choice and autonomy.<sup>109</sup> In Duff's vision of communitarian criminal law, community is neither opposed to nor conceived as superior to the figure of the individual. Rather, it defines the very nature of the individual, and any political philosophy, liberal or otherwise, 'must begin with individuals in community, with individuals who already recognise themselves as living in community with others.'<sup>110</sup>

Lacey also denounces the falseness of the dilemma between personal autonomy and social good, and argues along with Duff that individual autonomy can in fact be reinforced by being considered in a social context made of other autonomous individuals.<sup>111</sup> This revised conception of autonomy according to communitarianism therefore considers the individual's social nature and relationships, but also his ability to control his actions at a practical day-to-day level, and as part of a broader social and political context.<sup>112</sup>

Although the individual remains at the centre of communitarian philosophy when applied to criminal justice, that individual is defined not as pre- or a-social but as fully social, part of and defined by his relationships with a community.<sup>113</sup> Whereas liberal individuals must 'find reasons to enter into association or solidarity with others',

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<sup>108</sup> Duff *Punishment, Communication and Community* (n 25), 47 (original emphasis).

<sup>109</sup> Duff argues that communities are not all political, nor are they all 'for life', and therefore the liberal individual can still exercise choice according to which communities he does or doesn't belong to (apart from a select few such as family etc...), *ibid*, 50.

<sup>110</sup> *ibid*, 52.

<sup>111</sup> Lacey *State Punishment* (n 17), 179; and Duff *Punishment, Communication and Community* (n 25), 55.

<sup>112</sup> Lacey *State Punishment* (n 17), 178.

<sup>113</sup> or a number of communities; the multiplicity of the concept of community and the nature of community relationships will be explored further below, s III.

communitarian individuals begin their normative or philosophical lives ‘not in isolation ... but as a ‘we’ – as individuals already in association or solidarity with ... groups of others, who should (and can) detach themselves from such associations only if given reasons to do so.’<sup>114</sup>

This approach to communitarianism could also redefine the original position posited in Rawls’ theory of justice. In order to account for the intrinsic character of the individual’s social nature, one can imagine a version of the veil of ignorance woven specifically to let through this characteristic. While the subject of this experiment would not necessarily know the exact nature of his relationships, and to whom he is related in practice, he would be aware of his social nature and of the fact that he is defined by his relationships with others.<sup>115</sup>

Just as Rawls’ veil of ignorance fails to provide a practicable version of justice and individual responsibility, this alternative version remains hypothetical. It does, however, highlight the obsolescence of the liberal individual in its original form, and points to the contradiction it fosters between criminal legal doctrine and the social context in which it is applied.<sup>116</sup> In this vision, the values of autonomy and freedom are seen as ‘socially constituted’ values, which can be recognised within the communal context, while also remaining positive values from the perspective of the individual.<sup>117</sup> An individual’s relatedness and the way he interacts with others can be a central element in the determination of his responsibility towards others for his actions, and autonomy itself can be realised in the domain of socialisation.<sup>118</sup>

The following section will explore the concept of community and its characterisation as the other party in the relationship this model of liability would seek to regulate.

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<sup>114</sup> Duff *Punishment, Communication and Community* (n 25), 51.

<sup>115</sup> In the same way that Rawls saw the possibility of the rational autonomous individual choosing social relations as part of his version of the good (see above, n 4), this re-interpretation preserves the possibility for the intrinsically social individual to choose autonomy and self-sufficiency rather than social relationships, although that choice would be made from the perspective of his social nature.

<sup>116</sup> In his discussion of legal doctrine in general, Cotterrell calls liberalism ‘a part of legal ideology in which the contradiction between legal doctrine and the changing social environment in which it is applied are breaking through the calm surface of legal ideas,’ Roger Cotterrell, *The Sociology of Law: an introduction* (Butterworths 1992), 305.

<sup>117</sup> Duff *Punishment, Communication and Community* (n 25), 54.

<sup>118</sup> Roger Cotterrell, ‘A Legal Concept of Community’ in *Law, culture and society: legal ideas in the mirror of social theory* (Ashgate 2006).

## **B. Finding a Basis for Liability: Redefining the Community**

Traditional representations of community in the context of the law have been incomplete with regard to responsibility and their representation of social relations. Drawing from communitarian principles, this section will present an alternative to these representations of community, based on the legal sociological concept of 'web of understanding'. This characterisation provides a concept of community defined by the interests which draw a group of individuals together and the existence of a high degree of interaction between those community members. As such, it can provide a basis for the imposition of liability when those interactions are interfered with and the community relationship is damaged.

### **1. Community and the law: traditional conceptions of community**

Community is an elusive concept and its characterisation in a legal context often relies on the traditional dichotomy between the sociological concepts of 'Gemeinschaft' and 'Gesellschaft'.<sup>119</sup> The former represents the pre-modern notion of community based on kinship and common values, whereas the latter became shorthand for the modern conception of 'society' based on association between free-thinking and ultimately self-interested individuals. This section argues that these conceptions provide an unsatisfactory basis for imposing liability, and are ultimately unrepresentative of the reality of social relationships in our society.

#### ***a) Community as Gesellschaft***

Although the sociological notion of community is more complex and disputed than a simple dichotomy could suggest,<sup>120</sup> community as the social environment of law is

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<sup>119</sup> The terms were coined in Ferdinand Tönnies, *Gemeinschaft und Gesellschaft*, (Fues 1887).

<sup>120</sup> For more details on the complexity of the notion of community in sociological theory, see Steven Brint, 'Gemeinschaft Revisited: a Critique and Reconstruction of the Community Concept', (2001) 19(1)

generally seen in one of two ways: as a 'morally cohesive association of politically autonomous people' or as 'individual subjects of a superior political authority.'<sup>121</sup>

These two perspectives loosely mirror the concepts of *Gemeinschaft* and *Gesellschaft*, the former representing a traditional conception of 'community', and the latter relating to a more restricted concept of community as 'society'.

From the perspective of the imposition of liability, the notion of a *Gesellschaft*-like community is perhaps most prominently displayed in the influence of liberal individualistic principles. As shown in the first part of this chapter, the importance of the figure of the autonomous and rational individual and the related fear of the social have defined criminal liability as regulating the relationship between autonomous rational individuals, mediated by the state. The concept of community refers solely to the aggregation of independent and autonomous individuals which represent society in general. As a result, the question of the social and the concept of community remains of secondary importance, and is taken into consideration only insofar as it qualifies or provides a background setting for the action of the responsible individual.

This concept of community constitutes a weak version of the relationship between its individual members, based on the relationships they have as autonomous individuals with each other but with no consideration for the overarching entity which it creates.<sup>122</sup> There is no intrinsic value attached to the existence of the relationship, and it plays no part in the definition of the relational nature of liability. An individual will be subject to liability for his actions because he has acted against the predetermined rules of the society he lives in as a whole.<sup>123</sup> This assimilation of community with a broader political entity relates to the 'typical imperium image of the regulated population in modern legal philosophy' which is constituted of 'independent

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Sociological Theory 1; Brint refers in particular to the fact that 94 separate definitions of community existed by the mid-1950s: *ibid*, 5, referring to George Hillery, 'Definitions of Community: Areas of Agreement' (1955) 20 (2) *Rural Sociology* 111; another commentator calls the notion of community 'infuriatingly slippery,' in Peter Hamilton, 'Editor's Foreword', in Anthony P Cohen, *The Symbolic Construction of Community* (Routledge 1985), 7.

<sup>121</sup> Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon 1995), 222-3, strictly speaking, the latter example, referred to as 'imperium', does not represent a community relationship according to the author; the term community is used here in its everyday meaning, which is closer to the larger idea of society.

<sup>122</sup> Lamond refers to this 'weak version' of community relationships in his article on the nature of crime, in Grant Lamond, 'What Is a Crime?' (2007) 27(4) *OJLS* 609, see chapter 1, text at n 162.

<sup>123</sup> This is related to the limits imposed by the harm principle, as presented above, text to n 22.

isolated legal persons.<sup>124</sup> Liability in this context cannot be said to be based on the notion of community, but merely the enforcement of the rules regulating society as a whole, populated by independent and autonomous individuals.

### **b) *Gemeinschaft and liability***

By contrast, the idea of community as a morally cohesive social grouping might initially appear to provide a more appropriate basis for the imposition of a community-based liability. The closer bonds which characterise *Gemeinschaft*-type communities could be seen to justify the imposition of liability as a protective measure for its positive value. However, the figure of the community as a mythical exemplary entity arguably represents an unsophisticated vision of social interactions and relationships.<sup>125</sup> Community as *Gemeinschaft* was developed as an illustration of the relationships drawn among individuals in a particular social setting, often a village, a small town, a family or a parish. Yet the last century has seen an increase in the number and complexity of social relations, placing this conception in the realm of anachronism.

Geographical boundaries have been abolished by population movement and technological advances, creating a 'social technology [which] has liberated people from dependence on spatial locality'<sup>126</sup> and allowed the formation of 'virtual' and 'personal' communities. Communities which were traditionally based on a physical or 'face-to-face' interaction between individuals are now complemented by virtual and even imaginary relationships, enabled by the development of remote social networks and encouraged by a globalisation of individual interests.<sup>127</sup> The availability of technology allows for new types of mediated interactions which create different and contrasting models of communities.<sup>128</sup> Individuals are now increasingly likely to be remotely in

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<sup>124</sup> Cotterrell *Law's Community* (n 121), 225-6.

<sup>125</sup> Jock Young, 'Identity, Community and Social Exclusion' in Roger Matthews and John Pitts (eds), *Crime, Disorder and Community Safety* (Routledge 2000), 26; Adam Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (Clarendon Press 1997), 45, 153, as mentioned in Adam Crawford, 'Crime Prevention and Community Safety' in Mike Maguire, Rod Morgan, and Robert Reiner, (eds) *The Oxford Handbook of Criminology* (OUP 2007).

<sup>126</sup> Jock Young (n 125), 37 and further, discussing the 'deterritorialisation' of community.

<sup>127</sup> Iris Young in particular discussed the importance of mediated interactions in forming communities: Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

<sup>128</sup> Jock Young (n 125), 36.

contact with people not necessarily living in the same geographical space as themselves, and are also more likely to share interests on a broader scale than the traditional, locally defined community that surrounds them. This might be a web-based Christian community, or the members of a local neighbourhood organisation who have become friends through their shared interest for a particular type of music.

This shift in social interactions renders the conception of a small, close-knit community in the *Gemeinschaft* sense of the term redundant, and also highlights the rigidity and exclusionary character of that conception. If community is constituted as a morally cohesive group, it also becomes an objectively defined social entity, characterised by the distinction between members and non-members. Individuals who are not part of the community in question effectively become 'elements in the group itself'<sup>129</sup> and the identification of non-members helps to define the concept of community in itself, similar to the way that the identification of the individual self can be attached to one's identification of the 'other'.<sup>130</sup>

The dichotomous nature of this conception of community shifts the focus away from the relationship between individual members and towards their individual status as member or non-member. In terms of liability, this in-or-out definition of community can become a means to impose the 'good' morality of the community on the 'bad' minority. It runs the risk of becoming little more than a social construct which enables a judgment of morality of one group over another, creating and fostering social exclusion.<sup>131</sup>

The risk of social exclusion is most closely associated with the concept of the community as a political or local entity defined by objectively or even physically imposed boundaries (geographical communities, neighbourhoods, etc). The concept of community often conjures up images of small and close-knit communities, which liberal critics reject on the grounds that it is both unrealistic and restrictive of individual autonomy.<sup>132</sup> It is also often criticised as conducive of illiberalism and social

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<sup>129</sup> Cotterrell 'A legal concept of community' (n 118), 71, referring to Georg Simmel's work, in Donal N Levine (ed), *On Individuality and Social Form* (University of Chicago Press 1971), 144.

<sup>130</sup> Cotterrell, *ibid*, p.71.

<sup>131</sup> Jock Young (n 125), 26.

<sup>132</sup> Duff refers to communities 'bound together by rich sets of values and a determinant conception of human good that all are expected to share, their members taking a close and intimate interest in every aspect of one another's life,' Duff *Punishment, Communication and Community* (n 25), 42.



exclusion.<sup>133</sup> Imposing liability on the basis of community as a close, morally homogenous group of individuals reinforces the image of the community as the 'law abiding majority' and the 'place and source of all safety,' in opposition to the individual subject.<sup>134</sup> As the following section will argue, focusing on the way individuals interact provides a more representative concept of community.

## **2. Interactions as indicia of community**

This section presents a different perspective on the concept of community in a legal context. In the theory of living law as developed by Ehrlich,<sup>135</sup> various community relationships play an important legislating role. This highlights the conceptual value of the interactions which take place between members, and helps define community without creating an objectively defined entity.

### ***a) Community and the law in postmodern society: towards a more representative vision***

In the notion of living law, the concept of community is an umbrella construct under which sits a number of diverse bodies, including families, clubs, or associations. These social organisations are considered the true legislating bodies in society: they create specific rules for their members to follow, and those rules are considered law

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<sup>133</sup> Seminal work such as Stanley Cohen, *Folk devils and moral panics : the creation of the Mods and Rockers* (3<sup>rd</sup> edition, Routledge 2002) have highlighted the risks attached to community and social exclusion from a sociological perspective, relating in particular to young people, an issue which has become a key criticism of anti-social behaviour legislation and its targeting of young and vulnerable people. See for example Peter Squires and Dawn E. Stephen, *Rougher Justice: Anti-Social Behaviour and Young People* (Willan Publishing 2005), Julia Fionda, Robert Jago and Rachel Manning, 'Conflicts over Territory : Anti-Social Behaviour Legislation and Young People', in Belinda Brooks-Gordon and Michael Freeman, *Law and Psychology : Current Legal Issues Vol. 9* (OUP 2006) and Rachel Fyson and Joe Yates, 'Anti-social behaviour orders and young people with learning disabilities' (2010) 31(1) Critical Social Policy 102.

<sup>134</sup> Jock Young (n 125), 26, this characterisation and rejection of the concept of community is also closely associated with the political concept of 'community safety' in terms of law and order policy, as discussed in chapter 2, see text to n 97.

<sup>135</sup> This theory was developed by the legal sociologist Eugen Ehrlich, in *Fundamental principles of the sociology of law* (Harvard University Press 1936).

precisely because they emanate from the group in question.<sup>136</sup> This concept emerged in opposition to the perceived dominance of a ruling state whose political standing was growing more fragile and precarious.<sup>137</sup> It challenged the centrality of the relationship between the individual and the state to the law and explored the relevance of social interactions between individuals in the legal context. Its 'polemical purpose' was to represent the 'ever present *conscience* of state law,' in order to highlight the 'particular legal importance of the nation and the community as social associations.'<sup>138</sup>

This representation of social relations draws from the idea of small and close-knit groups, reminiscent of *Gemeinschaft*. But the nature of the groups which are considered legally relevant is not based on kinship and shared moral values within a small local setting, in the way of traditional communities. In fact, many of the groups and associations referred to by Ehrlich are groups which would be voluntarily entered into, for benign reasons (including sporting organisations, clubs and societies). The nature of these groups suggests that their legal value does not stem from the moral nature of the social interactions. Rather, it can be linked to the existence of an interaction in itself, and the decision made by individual members to form or enter those groups, and therefore to create or abide by the rules in question.<sup>139</sup>

Living law ultimately adopts a limited conception of which social interactions may be considered legally relevant.<sup>140</sup> Nevertheless, its characterisation of social groups is useful to highlight how the concept of community can be construed in a legal context to represent social interactions in a variety of settings, drawing individual members together and creating various communities.

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<sup>136</sup> Sometimes explicitly as with sporting clubs or even the state applied criminal law, and sometimes implicitly as with family 'rules'; in comparison, the state is but one, albeit very large, legislating body imposing rules on its members.

<sup>137</sup> Ehrlich's work was influenced by the fall of the German state in the 20s and 30s, as discussed in Cotterell 'A legal concept of community' (n 118).

<sup>138</sup> Ehrlich (n 135), 61-2.

<sup>139</sup> The characterisation of the bond linking those members of social groups is similar to Durkheim's concept of 'organic solidarity'. He opposes it to 'mechanical solidarity', which stem from kinship and close moral or religious bonds. See below, n 157.

<sup>140</sup> Ehrlich's conceptualisation of 'legislating bodies' as small and socially contained entities is both restrictive, as it limits the status of community to groups which have some sort of established rules and regulations, but also too wide as it makes no theoretical distinction between such groups and fails to characterise the nature of the groups themselves.

### ***b) Interactions in community relationships***

This perspective also reflects the reality of community relations, in which individuals relate to each other in a variety of different ways. These new and changing patterns of social interactions in turn create a variety of different communities within society. Indeed, the typical postmodern image of 'society' is of 'a vast, endlessly shifting diversity of interests, values, projects and commitments of individuals, expressed and pursued through multiple, transient memberships of collectivities of many different kinds.'<sup>141</sup> The members of a web-based Christian group will interact and relate to each other based on a number of common interests which define both themselves as individuals and the group as a whole. The increasing complexity of social relations generates multiple layers of interactions, and creates a number of different groups or associations which may qualify as communities. Certain members of a local neighbourhood association may find a shared interest in punk rock music and bond over it, going to concerts, socialising and listening to music together. The social interactions at play here create overlapping social groups, all of which can be characterised as a distinct community, existing alongside or within each other: punk rock music lovers, the local neighbourhood association, and the wider local community of those inhabiting the neighbourhood, who may or may not be part of the association itself.

This depiction of social interactions and community relationships differs both from the *Gemeinschaft* community, and from the idea of a soulless aggregate of individuals as in the *Gesellschaft* community. Its reliance on actual social interactions and individual relationships makes it narrower than the former and broader than the latter, and suggests a much wider range of what can in fact represent a community. The traditionally close-knit communities are not unravelled into a bundle of individual strands, but rather are re-knitted into a number of different and often smaller patterns to represent the reality of social interactions, based on 'common experiences, ties of affect and loyalty and personal interest in one another rather than by formal authority and rational interests.'<sup>142</sup>

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<sup>141</sup> Cotterrell 'A legal concept of community' (n 118), 66.

<sup>142</sup> Brint (n 120), 11.

The previous example of a Christian punk-loving group can help illustrate this concept. The relationship between the members will be defined by a range of interactions, based on their common interests in Christian religion and punk rock music. Those interactions in practice may involve prayer or scripture discussion, but also playing, writing or listening to music, as well as attending events, services and music concerts. The way those individuals relate to each other represents the foundation of their relationship; they are a community because of what they do and share together, beyond their beliefs and values which may shape and inspire the way they relate to each other. The combination of Christian faith and the political or social message associated with punk rock may well represent a very strong influence on the relationships constituting this particular community, but it is not necessarily its defining characteristic.

Consider the hypothetical of an agnostic member of the same religious congregation who, because of romantic feelings towards one of the members of the group, has joined in some of their activities. Provided he is in fact taking part in the group's activities and relating to the members in the same manner they relate to each other, his lack of strong beliefs regarding Christian or even punk rock values does not necessarily affect his relationship with the group, nor does it rule him out as a member. The way in which he interacts with other members and his relationship with them is more significant than his belief in specific moral values.<sup>143</sup>

This example illustrates how a community relationship can be defined by the bonds linking members together, without those bonds necessarily representing normative values. In fact, they find their expression in the way individual members interact with and relate to each other. As the following section will argue, those interactions represent the intrinsic value of the concept of community, in keeping with communitarian principles.

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<sup>143</sup> There will likely be a point at which the deception could lead to the individual being rejected by the group, but it is not a far-fetched consideration to assume that members could happily treat him as a part of the group without questioning his values and beliefs in detail.

### 3. Redefining community relationships

Building on communitarian accounts of community relationships based on positive emotions, this section explores how the concept of community can be characterised to reflect the value of its members' interactions. Relying on the socio-legal notion of a 'web of understanding', a more neutral image will be presented.

#### *a) Community interactions beyond love and affection*

The figure of the community at the heart of the communitarian movement is seen normatively as a positive value, defined by individual members' capacity to relate to each other. As such, communitarianism does what other conceptions of community did not: it explores the nature of the relationships and interactions which constitute a community.<sup>144</sup>

In order to embody the constitutive element of commonality as a defining feature of individuals, normative communitarians characterise community as a force for good, a positive attachment which defines the individual because he is actively connected to the people surrounding him. In this context, community is not a neutral state of being, but a necessarily positive feature of any individual's life.<sup>145</sup> Normative communitarians reject liberal individualism for its reductive construction of the self.<sup>146</sup>

By contrast, if community is to be given the central role communitarianism advocates, it necessitates the existence of strong bonds between individuals. To the deontological and coldly rational figure of the Kantian and Rawlsian individual, normative communitarianism opposes that of the individual in the community, capable of 'qualities of character, reflectiveness and friendship that depend on the possibility of constitutive projects and attachments.'<sup>147</sup> This conceptualisation gives an emotional or sentimental account of the bonds which tie individuals together—Sandel uses the term 'love'—and provides a striking alternative to the liberal conception of the rational and detached individual.

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<sup>144</sup> In particular *Gesellschaft* and *Gemeinschaft*, see above text to n 119.

<sup>145</sup> See for instance MacIntyre *After Virtue* (n 72) or Sandel *Liberalism and the Limits of Justice* (n 73).

<sup>146</sup> A 'person wholly without character, without moral depth,' Sandel (n 73), 179.

<sup>147</sup> *ibid* (n 73), 181.

Community relations as emotional attachment can be expressed in a variety of ways, ranging from informal agreements between members to strong emotional bonds.<sup>148</sup> While the latter conjure up images of closely-knit groups reminiscent of Gemeinschaft-style communities, and raise the spectre of exclusion based on the values of the 'good' community, this conception of community is not necessarily limited to emotional or moral attachment between its members. In his work on a communitarian vision of punishment, Duff considers the possibility of communities which are bound together by their respect for one another within the context of specific shared values, but without the existence of the embracing emotional attachment liberalism seeks to avoid.<sup>149</sup> In order to prove that such communities can exist, he eschews the traditional examples of family and friendship, and focuses on the example of an academic community.<sup>150</sup> Such a community would not necessarily be defined by geographical or even institutional closeness, but would instead rely on a shared commitment to certain defining values which represent intrinsic communal goods, and the existence of mutual regard and respect for one another.<sup>151</sup> Other defining features could be its aspirational value for members, the existence of room for disagreement within the community, its coexistence and overlap with other types of communities, and its partial nature which restricts the interest that it can take in its members' lives, and also that members can take in each others' lives.<sup>152</sup>

From this example, Duff draws the outline of what he calls a '*liberal* political community, a polity defined and structured by a shared commitment to such central liberal values as freedom, autonomy, privacy and pluralism, and by a mutual regard that reflects those values.'<sup>153</sup> On the basis of this type of community, Duff aims to construct a normative political theory which respects liberal ideals while preserving communitarian metaphysics and reflecting the reality of human and social interactions. Whilst its scope is ultimately wider than that of this work, this approach is useful conceptually when considering an individual's responsibility in the context of his

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<sup>148</sup> Sandel (n 73), 181.

<sup>149</sup> Duff *Punishment, Communication and Community* (n 25), 46.

<sup>150</sup> The idea of the 'academic community' is developed in Duff *Punishment, Communication and Community* (n 25), 43, but also in R A Duff, 'Penal Communities', (1999) 1(1) *Punishment and Society* 27.

<sup>151</sup> Duff refers to MacIntyre's concept of a 'practice' within the community, see MacIntyre (n 72), ch 14.

<sup>152</sup> Duff *Punishment, Communication and Community* (n 25), 47.

<sup>153</sup> *ibid.*

relationship with a particular community. At an abstract level, it illustrates how the liberal values of individualism can be preserved within communitarian metaphysics, encouraging the recognition of communities which respect and foster individual autonomy and freedom.

From a more practical perspective, this approach also highlights the diversity of the types of interactions which can constitute a particular community, beyond the emotional and moral concepts of love and friendship invoked by Sandel and other communitarians. Both accounts of the concept of community are premised on the way in which individual members interact with each other. This is particularly so in the academic community example, where reciprocity, the existence of room for disagreement and the possibility of creating communal ties remotely all represent modes of interactions between members of the community. Ultimately, it is those interactions and relationships which can provide the defining measure of a given community, over and above the moral values and emotional ties which might underlie those interactions.

Although Duff's account is still ultimately focused on the normative values which shape human relationships as a defining feature of the concept of community, it avoids some of the more sentimental terminology and embraces a more neutral perspective on social relations, in an attempt to create a more flexible concept of community. The following section will look at a concept of community which reflects this morally neutral perception of community on a smaller scale, creating a flexible and adaptable notion of community relationships.

### ***b) Community as a web of understanding***

The socio-legal concept of community as a web of understanding was developed by Cotterrell, in reaction to the fundamental vagueness of the notion of *Gemeinschaft* as to the scale and scope of the concept of community.<sup>154</sup> It is meant to express 'a sense of complex contemporary variation in the character of social groupings and allegiances

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<sup>154</sup> Cotterrell 'A legal concept of community' (n 118), 67; as was discussed in the previous section, this concept of community is not only vague but also unhelpful in terms of serving as a basis for imposing liability.

and in their reasons for existence.<sup>155</sup> In this theory, Cotterrell acknowledges that the existence of a community cannot be summarised by the sharing of particular values, or even any type of value at all. As he points out, communities are sites of conflict as well as harmony, and focusing regulation towards harmony runs the risk of creating exclusion and repression. Conceptually, community relationships should therefore be characterised as representing the different examples of social relationships which link individuals together.<sup>156</sup> This emphasis on the fluid nature of the concept of community recalls Durkheim's notion of social milieu, which represents community as a collective consciousness surrounding individuals and defining the nature and content of the law.<sup>157</sup> Although Durkheim considered this social milieu as a single entity within a particular system of rules, its fluid or shifting quality can be opened up to represent the multitude of relationships which constitute communities. Rather than drawing clearly marked and potentially arbitrary lines delineating communities and their individual members, this concept of community embraces the fluidity of social relations and recognises its value in 'provid[ing] people with the means to make meaning.'<sup>158</sup>

The concept of community as a web of understanding means that community interactions can take different and non-mutually exclusive forms, and will be drawn along certain lines or interests shared by a particular community's individual members. In the earlier example of the Christian punk-rock loving community, those interests would be related to their religious beliefs and musical taste, but would also extend to their participation in religious and music-related activities. Such interests can take a variety of forms, and will differ within each particular community, even in apparently similar communities. The archetypal example of local neighbourhood communities can be bound by a number of different interests and varying degrees of closeness. While

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<sup>155</sup> Cotterrell 'A legal concept of community' (n 118), 67.

<sup>156</sup> Cotterrell *Law's Community* (n 121), 332.

<sup>157</sup> The interactions which formed that 'social milieu' are however defined differently by Durkheim as either mechanical or organic solidarity between individuals. Mechanical solidarity essentially represents the traditional 'moral' notion of community, while organic solidarity takes into account the evolving nature of social interactions in modern societies. Both types of interactions however are focused on the existence of one community surrounding a particular individual. The individual's social milieu represents the – only – society or community of which he is a part, albeit a potentially shifting or evolving one. See Emile Durkheim, *The Division of Labour in Society* (Macmillan 1984), and Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh University Press 1999), ch 14, 215.

<sup>158</sup> Cohen *The Symbolic Construction of Community* (n 120), 19.



some local communities will enjoy a close affectionate bond in addition to their interest in enjoying their neighbourhood, others will adopt a more restricted relationship, with no additional emotional connection. Some might also connect more specifically over their reaction to a spate of disturbing or distressing behaviour, for example the existence of anti-social behaviour in the local area. The key element defining these communities is therefore not their geographical proximity or the fact that members live within the same neighbourhood, or at least not exclusively.

The idea of a web of understanding acknowledges and embraces the variety of ways in which members of a community may interact with each other, and provides a framework to characterise those interactions in a socially and legally relevant way, creating a new concept of community. Cotterrell identifies four specific types of community interactions, within which all interactions can be found: traditional communities, which include local geographical and linguistic communities, instrumental communities, which are drawn together by a convergence of interest (e.g. business groups), communities of belief, based on the sharing of values and beliefs stressing solidarity and interdependence and, finally, affective communities, which unite individuals bound by mutual affection.<sup>159</sup>

These categories represent four types of social interactions and engagement, based on a sociological analysis of human interactions, although, as Cotterrell forcefully points out, they do not represent empirically identifiable groups that could be clearly and separately labelled as communities.<sup>160</sup> In fact, any given community can and almost always will exhibit a mixture of some or all of the four types of interactions to varying degrees. These four types are therefore held to 'encompass *all* the distinct types of collective involvement that can be components of community.'<sup>161</sup> From there, communities are formed objectively through stable and sustained interactions, and subjectively by the need for some sense of attachment or belonging from its members.

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<sup>159</sup> The four types of community interactions identified are presented and developed in more details in Cotterrell 'A legal concept of community' (n 118), ch 4.

<sup>160</sup> Cotterrell 'A legal concept of community' (n 118), 68-69; the four types of interactions are based on Weber's four types of social action, which represent traditional action, purpose rationale action, value rationale action and affective action, referring to Mark Weber, *Economy and society: an outline of interpretive sociology* (Bedminster Press 1968), 24-5.

<sup>161</sup> Cotterrell 'A legal concept of community' (n 118), 70.

The need for shared interests and sustained interactions as a basis for establishing a community relationship is perhaps best illustrated by the example of local neighbourhoods. As discussed, social interactions based on geographical locality are relatively weak in post-modern society, and do not necessarily represent a high degree of connection between individuals. This type of interaction, deemed 'traditional' according to Cotterrell, will therefore only be 'plausible as an identifier of community where it identifies a relatively high intensity of interaction within the population and a relatively highly developed communication network.'<sup>162</sup> Residents of a local area will not necessarily constitute a community through the sheer fact of living in proximity to each other, although the existence of a certain degree of interactions between its members could make it one. This could be their shared interest in raising their children in a safe environment, their collective effort in cultivating an allotment garden, or their involvement in a local neighbourhood association. This degree of sustained and stable interaction will also be complemented by individuals' identification as members of this particular community to the exclusion of others. This does not necessarily call for a negative or exclusive attitude towards non-members, but creates an indicia of community which allows for its identification in the same way that the individual self can identify him or herself in relation to the other.<sup>163</sup>

The construction and identification of this identity relates to the subjective element of community interactions, which Cotterrell terms 'mutual interpersonal trust'. Here again, the concept is held to take a variety of different forms, and can be expressed in different ways, but ultimately constitutes the founding component of the characterisation of community as a web of understanding.<sup>164</sup> This notion of interpersonal trust is the underlying impetus for the way individual members of a particular community relate to each other, and will generally inspire the sustainability or durability of these interactions which form the cornerstone of that community.

The principal aim and advantage of adopting this concept of community is that it reflects the reality of social relations in contemporary society, and provides a legal concept of community which can form the basis of liability and reflect the multitude of

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<sup>162</sup> Cotterrell 'A legal concept of community' (n 118), 70.

<sup>163</sup> *ibid*, 71.

<sup>164</sup> *ibid*, 74.

different communities protected by it. Focusing on the interactions which take place among the individual members of a given community provides a focal point when regulating the relationship between an individual and that community which is neither superficial nor based on morality. This characterisation of community relationships provides a narrower and more manageable focus when identifying what constitutes a community and creates a legal conceptual tool to identify what sort of behaviour will warrant the imposition of liability. The following section will explore how that conceptual tool can be applied to create an alternative community-based model of liability.

### **III. Constructing a Community-Based Model of Liability: Wilful Engagement and Community Interests**

The introduction to this chapter presented Duff's conceptual analysis of responsibility and liability, and his formula for responsibility: in any given relationship which gives rise to responsibility, an individual D is responsible to S, for X, in his quality as  $\mu$ .<sup>165</sup> In a model of community-based liability, the individual is considered responsible not to society as a whole, but to a particular community which has been affected by his behaviour. According to this formula, S would represent a specific community, and D would be responsible in his quality as a socially constituted individual.

The previous section presented the nature of individual responsibility seen through the prism of social and community relationships, setting the scene for an alternative model of liability. This section will develop this model of liability further, identifying two key defining elements: the type of behaviour for which an individual could be held liable, and the mental subjective requirement to his liability.<sup>166</sup>

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<sup>165</sup> Duff *Answering for Crime* (n 1).

<sup>166</sup> These two elements are not meant to represent a fully formed model of liability, which would require much more work than this thesis allows; however, they are held to represent key ingredients in the search for a community-based model of liability, and provide a guide to examine the original hypothesis regarding the type of liability imposed by ASBOs.

## **A. Determining the Responsibility of the Socially Constituted Individual**

In community-based liability, the redefinition of the figure of the responsible individual presents an alternative version of why the individual is to be held responsible for his behaviour. This version focuses on his ability and capacity to engage with others around him rather than his ability to control his actions or behave in a particular way at a given moment. This capacity to engage with others must be taken seriously when determining responsibility to communities, in order to embrace communitarian and individualistic ethics without sacrificing the latter to the former. The second part of this section will present the notion of wilful engagement as a requirement of individual responsibility, which preserves this balance of interests.

### **1. Creating a relationship between individual and community**

Community-based liability is premised on the regulation of individual behaviour which affects other communities. Within that premise, D's quality as a socially constituted individual is essential to the conception of his responsibility. It challenges the liberal presumption that there is such a thing as an asocial individual, and rejects the isolation of its 'pre-social' identity.<sup>167</sup>

This vision of the responsible individual as indissociable from its social nature affects the subjective nature of individual responsibility in this particular context. D will be held liable for behaviour which harms a community because of how he relates to and engages with it. The value of those community relationships calls for their protection through the imposition of liability, because 'the assumption of the primacy of the social prompts a shift of emphasis in which the maintenance, stability and continuing development of a society is a necessary condition for the flourishing of the people within it.'<sup>168</sup> In the same way that liberal criminal liability aims to protect

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<sup>167</sup> This is related to Sandel's criticism of Rawls' theory of justice, as discussed above, see text to n 81.

<sup>168</sup> Lacey *State Punishment* (n 17), 172.

individual autonomy by holding people accountable for the choices they make when exercising that autonomy, so an alternative model of liability can aim to protect an individual's social nature by holding people accountable for the way they exercise their ability to relate to and engage with others around them.

If autonomy is seen as flowing from an individual's identity and relatedness,<sup>169</sup> then one's ability to form social relations and connect with others isn't just considered a product of that autonomy, but becomes inextricably linked to it. By wilfully engaging with others, we create social relationships which make us responsible to those we engage with, and in turn can form the basis for the imposition of liability if we harm a community's interests. The next section will consider this notion of wilful engagement as one of the defining elements of a model of community-based liability.

## **2. Establishing individual responsibility: the notion of wilful engagement**

The subjective character of criminal liability is generally expressed by its requirement of a guilty mind and choice in the defendant's actions. The notion of wilful engagement in community-based liability represents a different take on the subjective nature of responsibility, ensuring that liability reflects the value both of individual autonomy and of social relations, and is applied to the individual only if he has engaged or made a connection with those affected by his behaviour. If he has not wilfully engaged with the community affected by his behaviour, then he would not be responsible to that community and could not be held liable for his behaviour in that way. This requirement preserves the value of individual autonomy by recognising a level of deliberation and voluntariness in the individual's behaviour. It also ensures the protection of communities by focusing on the way the individual interacts with communities specifically, rather than other individuals or society in general.

The distinction this characterisation of subjective responsibility draws between criminal and community-based liability can be illustrated by the example of an individual stealing vegetables from a local allotment tended by a community of local

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<sup>169</sup> Selznick (n 86), 463.

residents. The act of stealing vegetables represents a crime because it interferes with another's property rights, and provided the defendant has the required subjective intention regarding the act, he can be held criminally liable for his actions.<sup>170</sup> In addition, the theft of vegetables can also be held to interfere with the community's interests, based on the local and instrumental nature of its members' interactions in growing and enjoying the cultivation of vegetable in a peaceful local environment.<sup>171</sup> However, the defendant will not automatically be found liable for this impact on the community, if he is found not to have wilfully engaged with it.

For instance, if the individual has been stealing vegetables from a range of locations which occasionally happened to include the specific allotment, the impact of his behaviour would be unrelated to the existence—or lack thereof—of a connection between the allotment-keepers and the defendant. In stealing indiscriminately from a number of different allotments and gardens, the defendant would have failed to wilfully engage with that particular community. The lack of a significant connection and the absence of any intention to target this allotment specifically therefore undermine any finding of liability for the behaviour's effect on the community in question. In contrast, if that same defendant has been targeting that specific allotment, his behaviour shows a significant degree of voluntariness, targeted at the community in question, and thus creating a degree of wilful engagement with it. He can be held liable for interfering with their interests in growing vegetables and enjoying their use of that plot of land. Although it stems from the same behaviour, this liability is therefore distinct from his criminal liability for the theft of the vegetables, and the defining element of subjective responsibility in this case relates to a different conception of individual autonomy.

A finding of wilful engagement will be determined by the facts of a particular case, and can be represented by a range of interactions. In the case of the vegetable thief, the repeated specific targeting of the allotment would be proof of a wilful engagement with the particular community, irrespective of whether it was for no apparent reason, or because it had the best potatoes, or the lowest fence. In this example, the

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<sup>170</sup> According to the English criminal law, the crime of theft involves the 'dishonest appropriation of another's property, with the intention to permanently deprive,' Theft Act 1968, ss 1-6.

<sup>171</sup> The type of behaviour which can give rise to community-based liability are discussed in the following section.

responsible individual does not need to have a pre-existing relationship with that specific community or indeed to be a member of that community in order to wilfully engage with it, as long as his behaviour creates a strong enough connection to establish a basis for liability.

In many cases, however, the individual will already be related to or even a member of the particular community whose interests are affected by his behaviour. If the behaviour takes place within a particular neighbourhood, for instance, the responsible individual's status as a local resident can make him a member of the very community his behaviour might harm. In that case, the existence of a wilful engagement will be related to but ultimately distinct from the existence of that relationship. Take the example mentioned in a previous chapter of the violent husband who regularly beats his wife in public places.<sup>172</sup> He is a member of the community because of his place of residence, and possible connections with other local residents. The way he carries out his harmful behaviour, however, will determine whether he was wilfully engaging with that community in that instance, and thereby making himself liable for the harm caused to it. If it can be proved that the husband made a conscious effort to shield members of the public from witnessing his behaviour in any way, e.g. by muffling sounds or choosing particular locations, then he could be found not to have wilfully engaged with the community in question: he voluntarily ensured there was no interaction with it.<sup>173</sup> His civil liability towards his wife for the harm caused to her and his criminal liability towards society in general will be unaffected by the manner in which he carried out the violence. However, his responsibility towards the local neighbours and residents will not be established if he has not shown a degree of wilful engagement towards them.

Awareness and even membership of a particular community does therefore not necessarily equate to the existence of a wilful engagement with that community. If the responsible individual is not a member of the community affected by his behaviour to start with, his wilful engagement will be crucial in establishing a connection with the community affected by his behaviour, and will form the basis of his subjective

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<sup>172</sup> Ch 3, text to n 48 and below.

<sup>173</sup> The probability of his succeeding in doing so may be questioned, but for the purpose of this example, it will be assumed that he was successful.

responsibility towards that community. However, in the presence of a pre-existing relationship with that community, his wilful engagement will be determined by an examination of the way the behaviour was carried out. The following section will explore the second defining element of a community-based model of liability.

## **B. Defining the Harm of Community-Based Liability**

The second key element which defines an alternative model of community-based liability relates to the type of behaviour for which an individual can be found liable. Rather than being defined by its effect on specific individuals or society in general, the behaviour will be deemed harmful based on the impact it has on the community the responsible individual has been wilfully engaging with. Where a community is defined as a group of individuals tied together by common interests and a high degree of interaction, as it is in this model of liability, harm to it can be identified by the interference with that community's specific interests, rather than negative impact it may cause to society or other communities. This perspective sets this model of liability apart from civil and criminal liability as it does not rely on a predetermined and overarching notion of harm, but relies on the existence of specific protected interests to identify the existence of harm done to the community affected by the behaviour.<sup>174</sup>

### **1. Harm as interference with a community's protected interests**

Community-based liability's relational nature affects its focus when considering what behaviour will give rise to liability: instead of being premised on the violation of individual interests within the public sphere, as with criminal liability, it is imposed because the behaviour affects the interests of a particular community, causing it harm.

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<sup>174</sup> The term 'harm' in relation to criminal liability has come to take a very specific meaning, as was presented in the previous chapter. Although it differs conceptually from traditional notions of liability, the type of behaviour identified in this section is referred to as being harmful in the sense that it creates a setback to a particular set of interests, albeit the interests of a different entity.



If the criminal law's harm principle is based on an individual's interference with other individuals' private spheres, this type of liability can be said to recognise a multitude of 'community spheres'.

Responsibility occurs within the relationship between the individual and the community affected by his behaviour, and liability will generally include considerations beyond the simple existence of the behaviour in question. For example, if someone is found responsible for a spate of graffiti and tagging in a particular neighbourhood, his criminal liability will be determined by the way his actions have interfered with other individuals' interests, for instance by damaging another's property or trespassing on another's land when carrying out the graffiti. However, that same behaviour will affect the community differently from the way it affects those individual interests, based on the nature of the community itself and that individual's relationship with it. This may be because of the nature of the paintings, the manner in which they were carried out, or their precise location.<sup>175</sup> For example, the graffiti may be explicit, offensive or relate to existing gangs in the area thus causing a sense of insecurity; it could also simply block out windows in a public area, making it darker and more intimidating. Rather than being determined by the violation of predetermined rights and interests of the wider public as individuals, the harm caused to the community is determined by the way in which it interferes with that community's specific interests.<sup>176</sup>

The characterisation of community as a web of understanding is constructed on the existence of a degree of mutual interpersonal trust between its individual members. According to Cotterrell, that trust can be built in a number of ways and take a variety of forms, but needs to be built through 'stable and sustained interaction'<sup>177</sup> to create a legally relevant community relationship. It is these interactions, based on a combination of different interests, which will make a community unique and provide its defining characteristics. From the perspective of individual responsibility, these

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<sup>175</sup> The use of ASBOs to target graffiti as anti-social behaviour is discussed more fully and critically in ch 5, s1B2a.

<sup>176</sup> The differentiation in harm perception in communities affected by anti-social behaviour, between criminal and anti-social harm as well as between different communities, has been recognised in an empirical study regarding an inner city community's response to it; John Cromby and other, 'Constructing Crime, Enacting Morality: Emotion, Crime and Anti-Social Behaviour in an Inner City Community' (2010) 50(5) *Brit J Criminology*, 873; the results of the study are discussed in more details in ch 5, text to n 46.

<sup>177</sup> Cotterrell 'A legal concept of community' (n 118), 70.

interests represent a way to measure or appreciate the impact of an individual's behaviour on a given community: interference with those interests affects the relationship linking members of the community and ultimately undermines the existence of mutual interpersonal trust drawing them together, thereby causing harm to the community.

In the graffiti example, the interests which bring together the community are likely to be a sense of local geographical proximity, but may also relate more specifically to members' connection over a particular feature of their neighbourhood, for example the safety of children living in the area or, in this example, the prevention of the risks of violence associated with gangs. It is the interference with those specific interests which makes the behaviour harmful to this community and calls for the imposition of liability. Those interests will vary with every community and cannot therefore be predetermined in the same way that criminal liability operates. Instead, the interference would have to be assessed on a case-by-case basis, looking at the way community members interact and what interests draw them together.

This enables a flexible approach to the type of behaviour which gives rise to liability. Because of the diversity of a community's combination of interests, behaviour which sets back a community's interests will take different forms. Consequently, a particular type of behaviour might be considered harmful to one community, but not to another. In the traditional example of the music lover playing loud music late at night, such behaviour may be harmful to a community of neighbours whose interests include the peaceful enjoyment of their home, but it would unlikely be considered harmful if it took place in a community of techno-music fans living in warehouses in a disused industrial complex. Quiet and peaceful enjoyment is unlikely to be recognised as a protected interest in the second community, whereas it will probably be an important one in the first.

This flexibility reflects the relational nature of this type of liability, and the importance of matching the relationship between an individual and a given community. It is similar to Durkheim's characterisation of the criminal law's universal yet specific character, which he saw as 'specific to each community but universal in its

fundamental character.’<sup>178</sup> Similarly, the type of behaviour which will give rise to community-based liability can be defined as specific to each community, but universal in its fundamental character. It also relates to Duff’s theory of criminal liability, which he sees as a structure to be filled by the values and norms of a given society or polity.<sup>179</sup> Rather than reflecting the norms of values of society in general, this model of liability is constructed to reflect and protect the interests of a given community.<sup>180</sup>

## **2. Limiting the reach of community-based liability**

The role of specific interests as a measure of harm done to a community introduces a manageable focus when considering which communities will be protected by this type of liability. Adopting a morally neutral concept of community wards off some of the risks associated with the protection of communities as close-knit and morally uniform social groupings.<sup>181</sup> The use of specific shared interests as a mark of a community relationship creates smaller and more specific instances of communities. It also introduces a manageable focus when considering their protection, focusing on the tangible violation of their interests rather than subjective moral judgments about the behaviour. This shift of focus and the way it shapes community-based liability can be illustrated in the example of a male journalist who consistently attacks and belittles the value of women in the workplace and society in a widely published newspaper column. As a socially constituted individual, he is responsible to communities with which he has a relationship if his behaviour interferes with their protected interests. Here, it could be argued that the journalist would be responsible to the community of women for his misogynist articles, provided they were found to interfere with the protected interests drawing them together. However, the size of that community and

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<sup>178</sup> Durkheim (n 157), 32, as discussed in Cotterrell ‘A legal concept of community’ (n 118), 65.

<sup>179</sup> It also relates to Duff’s theory of criminal liability, which he sees as a structure to be filled by the values and norms a given society or polity; see Duff *Answering for Crime* (n 1).

<sup>180</sup> The flexible nature of community-based liability can prove a valuable factor in the context of ASBOs, as is argued in ch 5, section IIA1.

<sup>181</sup> These reservations are associated more generally with the development of a more communitarian system of responsibility, as discussed for example in Cruft (n 95).

the abstract nature of those interests, which are based on broad affective and instrumental ties, make the imposition of liability more difficult to determine.<sup>182</sup>

This does not mean that the publication of the articles could not amount to an offence under traditional criminal liability, nor that community-based liability could never be justified in that sort of case. If the articles were in fact published in a small local publication and riled against women in general and female taxi-drivers in particular, claiming that they were sub-standard drivers, bad company and incapable of being on time, the articles could be said to interfere with the interests of the community of female taxi-drivers operating in the area, and the harm caused could justify the imposition of community-based liability. The two versions of this example illustrate the existence of the outer limits of the concept of community as defined by protected interests. Depending on the circumstances of the case, the breadth of a community could make it difficult to identify clear protected interests which can form the basis of liability and potentially call into question its imposition altogether.

The imposition of this type of liability will also be limited by the types of interests that could be legally protected by community-based liability. From a sociological perspective, the concept of a web of understanding allows for a neutral construction of community. A community can be brought together by bad or good interests; it will still represent a community.<sup>183</sup> From the perspective of individual responsibility, however, a purely neutral conception of community arguably extends the reach of liability too far. For example, a community akin to the Ku Klux Klan or some neo-Nazi organisation will be tied by interests that many in our society would not deem worthy of protection, namely their beliefs in and attachment to xenophobia, violence and white supremacy. This extreme example highlights the limits of a community-based model of liability: holding an individual liable for interfering with those interests would conflict with their condemnation by the law.

The response to this issue is to consider that all interests which form the basis of a community may be protected by this model of liability if they are not in themselves considered illegal. To take a less extreme example, if members of the British National

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<sup>182</sup> The reach of the articles interfering with those interests could also potentially qualify the community in question, by limiting it to a particular country or region in which they are published or accessible, adding a geographical or traditional interest to the nature of that community.

<sup>183</sup> Cotterrell *Law's Community* (n 121).

Party or English Defence League were the targets of harassing behaviour which affected their ability to congregate and carry out their activities, then those responsible for that behaviour could be held liable for interfering with their interests as a legally recognised political party, irrespective of the message these organisations champion. As long as an organisation has not been outlawed, then its interests as a community drawn by a common purpose can be protected. If the organisation has been declared illegal, or the interest with which the behaviour interferes specifically is considered illegal (e.g. racism, homophobia, etc) then community-based liability will not be applicable. The former proposition is easy to envisage, leading for example to a lack of protection for organisations such as the Real Irish Republican Army (which is illegal in the UK), but the latter raises a finer distinction in terms of the interests being protected.

For instance, members of a legally recognised religious organisation putting together a campaign to protest the introduction of same-sex marriage may be the targets of harassing behaviour to disturb their activity. Although their interest in congregating as members of a religious organisation can be deemed worthy of protection as a community interest, liability could arguably be denied if the behaviour targeted exclusively the propagation of homophobia, as opposed to the interests of association and free speech which are legally shared by members of that community. The distinction would be difficult to prove in practice, and it seems hard to imagine a situation in which behaviour affecting a legal organisation would not give rise to liability because the interests interfered with were illegal. In most situations, there will be a number of different interests drawing the community together, and it seems likely that the determination of liability would rest on a balancing exercise taking into account the overall effect of the behaviour on the community.

One of the most important features of this balancing exercise is that the focus would remain on the interests of the community, rather than its general identity, or indeed how it defines itself. This can be related to an illustration put forward by Duff in his presentation of the relational nature of responsibility and the different relationships which can give rise to liability.<sup>184</sup> He presents the example of a gay couple

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<sup>184</sup> Duff *Answering for Crime* (n 1), 32.

living together and whose neighbours object to their living arrangements. Whilst the couple could be held to answer for their behaviour if they are too loud or trouble the neighbourhood in any other way, they cannot be held to account for their homosexuality, no matter how much it affects the neighbours. Within their relationship, only certain types of behaviour will give rise to liability, and the gay couple do not have to answer to their homophobic neighbours for their sexual preferences. In terms of protected interests, even if a community of offended neighbour could be identified, they would have no protected interest in living next to neighbours who do not offend them.

The existence of these limitations does not undermine the reliance on the concept of community as a basis for liability, but highlights the considerations that would have to be taken into account when applying a model of community-based liability in practice. They help to create a framework within which individuals can be held accountable for their behaviour which causes harm to a particular community, while limiting the risks of that responsibility weighing too heavily against the interests of the responsible individual. In practice, the application of this framework would be developed on a case-by-case basis, and would reveal more defined limits to the concept of a community's protected interests as a measure of individual responsibility.

This aspect will be examined in the following chapter, along with the rest of the framework, through the practical example of ASBOs. This examination will confirm and qualify the initial hypothesis that ASBOs represent a distinct model of community-based liability.

## **CHAPTER 5 – ASBOs AND COMMUNITY-BASED LIABILITY: A DIFFERENT PERSPECTIVE**

This chapter uses the framework developed in the previous chapter to examine how and to what extent the principles underlying community-based liability are reflected in ASBOs. While case law provides a number of illuminating examples showing their application in ASBOs, some cases also highlight apparent misapplications of this type of liability. These include adopting overly broad interpretations of the concept of community, and the imposition of liability in situations where the defendant appears incapable of wilfully engaging with the community affected.

This perspective allows the re-examination of the original hypothesis put forward in the first chapter. In the context of an alternative model of community-based liability, the dual nature of ASBOs can be seen as a legal tool to regulate the relationship between the responsible individual and the community affected by his behaviour. From this analysis, ASBOs emerge as an effort to regulate and protect a different type of social relationship, rather than an example of unprincipled liability.

### **I. Community-Based Liability in Practice: the Example of ASBOs**

This section explores how the defining elements of community-based liability have been interpreted in ASBOs. The first part looks at the concept of subjective individual responsibility and wilful engagement in the context of ASBOs, and how the courts have taken in consideration an individual's interaction with the relevant community when holding him accountable. The second part then examines what types of behaviour have been the subject of ASBOs, and how the orders take into account the harm done to a particular community in relation to its protected interests.

## **A. Individual Responsibility and Wilful Engagement in relation to ASBOs**

In the provisions of the Crime and Disorder Act 1998, ASBOs are not defined as having any specific subjective *mens rea* requirement.<sup>1</sup> Although section 1(5) and 1(10) introduce the possibility of invoking a ‘reasonable excuse’ at both stages of the order, anti-social behaviour is defined in terms of its impact or potential impact on others, and the decision of the court rests on whether it feels an order would be necessary to prevent further anti-social behaviour. Whilst the actual state of mind of the defendant appears to be irrelevant to his responsibility, the courts have recognised a subjective element to the determination of individual responsibility in the context of ASBOs. This subjective element can generally be characterised in terms of an individual’s wilful engagement with the community affected by his behaviour, as was presented in the previous chapter.<sup>2</sup> Consideration of an individual’s wilful engagement often appears to help determine individual responsibility and shape the terms of the ASBO. However, cases dealing with low-level criminal behaviour and mental health issues show that this subjective element is sometimes overlooked when imposing liability in ASBOs, highlighting a possible misapplication of community-based liability.

### **1. Individual autonomy and responsibility in ASBOs: identifying wilful engagement**

In their interpretation of individual responsibility in ASBOs, the courts’ focus on the specific circumstances of a given case and on the way an individual interacts with those affected by his behaviour illustrates the value of wilful engagement in determining individual responsibility.

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<sup>1</sup> CDA 1998, s 1.

<sup>2</sup> Ch 4, s IIA2.



**a) *Wilful engagement and the ‘reasonable excuse’***

By balancing an individual’s interests with the interests of those affected by his behaviour, the courts have adopted an approach to liability which focuses on the individual’s behaviour in a given community relationship. The case of *Nicholson*<sup>3</sup> reflects this approach to individual responsibility and highlights how the specific facts of each case can be taken as proof of an individual’s wilful engagement with a particular community. The defendant in that case was given an ASBO for her behaviour in harassing a particular organisation and its collaborators because of its scientific work with animals. The terms of the order prevented her from being within a certain distance of any building related to or working with the organisation she had targeted. She was found in breach of those terms when attending a demonstration, but argued that she did not realise this particular laboratory was related to the organisation she had been ordered not to approach. Her claim was accepted as a potentially reasonable excuse according to section 1(10) of the CDA, and the determination of that question was to be left to the jury.<sup>4</sup>

The jury’s consideration of the context and reason for the defendant’s actions therefore played a significant role in the decision to hold the defendant liable. If the jury found that she had truly not realised the demonstration would be taking place outside a building which belonged to the organisation she had been harassing, and thus had not been wilfully engaging with those protected by the ASBO, then her liability would not be established. The mere fact of finding herself within an area she was not supposed to be in could not, in and of itself, justify the imposition of liability, even if she was in fact demonstrating against animal testing and behaving in the way which had led to the order in the first place. As a result the prosecution would need to prove additional elements to justify the imposition of liability, for example that in doing so she actively meant to be in that area, or knew the links which existed between the organisation protected by the ASBO and the target of the demonstration.

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<sup>3</sup> *R v Nicholson* [2006] EWCA Crim 1518, mentioned above, ch 3 (n 30).

<sup>4</sup> It was decided that it would represent a question of fact rather than law: *ibid*, [15].

This approach reflects a certain level of subjectivity in ASBOs, and helps to redefine the nature of the defendant's responsibility.<sup>5</sup> Rather than being determined by his state of mind in relation to the act itself, it will be considered in the context of the defendant's relationship with the community affected. Its subjective character will be related to the degree of wilful engagement exhibited by the individual when carrying out his behaviour. In this particular case, the defendant's wilful engagement would in fact be similar to a more traditional consideration of subjective responsibility: committing the act in the knowledge that it would constitute a violation of the terms of the ASBO would be proof of a subjective *mens rea* in relation to the offence, but here it also represents an act of wilful engagement with those whom the order was designed to protect. Knowledge that the demonstration was taking place in the vicinity of one of the organisations she was ordered not to approach would represent an intention to breach the terms of the ASBO, as well as a wilful engagement with the community protected by the order.<sup>6</sup> Although both are exhibited by the same behaviour, they represent a different perspective on the nature of individual responsibility.

#### ***b) Distinguishing between wilful engagement and criminal intent***

Cases dealing with ASBOs granted for criminal behaviour can better illustrate the distinction drawn between the notion of wilful engagement as a defining element of individual responsibility and simple subjective guilt, for example in the cases of *Barclay*<sup>7</sup> and *Vittles*.<sup>8</sup> In the former, the defendants were found guilty of drug-dealing offences which had occurred in a particular area of Bristol and were given ASBOs relating to their drug-dealing behaviour. In the second case, the defendant was

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<sup>5</sup> This is particularly so in relation to the offence of breaching the order, which calls for increased safeguards because of the sanction attached to the breach of an order – *R v Charles* [2009] EWCA Crim 1570, also discussed ch 3, n 33).

<sup>6</sup> There is arguably a possibility that the defendant could be aware of the demonstration's links with the organisation, but claim that it had no relevance to her decision to demonstrate. This argument seems both unlikely to be accepted by the jury, and could be countered by the argument that the existence of the order altered the terms of the defendant's relationship with the organisation in question, making any conscious breach of the order a wilful engagement on her part.

<sup>7</sup> *Barclay* [2011] EWCA Crim 32, the facts of the case are explained in more details below, text to n 41.

<sup>8</sup> *R v Vittles* [2004] EWCA Crim 1089, [4].

charged and found guilty of twelve counts of theft and three of attempted theft committed specifically against US military personnel in service in the area. He pleaded guilty and was sentenced to 3 years and 10 months' imprisonment, and an ASBO was made excluding him from the area for an indefinite period.

In both cases, the defendants' subjective guilt regarding the crimes committed was uncontested: they had stolen or dealt drugs with the intention of doing so. Yet the discussion of their behaviour points to a different consideration when assessing individual responsibility in the context of the orders. Rather than relying on the criminal nature of their behaviour, the Court of Appeal in both cases emphasised the way the defendants had engaged with those affected by their behaviour. In *Vittles*, the defendant admitted that he had specifically targeted the area and vehicles belonging to American servicemen and their dependents, whose cars were easily identifiable because of a certificate in their windows. Although the issue of necessity relating to the anti-social nature of the behaviour was not specifically raised in the case,<sup>9</sup> the Court of Appeal made a point of distinguishing the case of *Vittles* from that of *R v P*<sup>10</sup> in which an ASBO was quashed because it could not be said that the order would be necessary after a sentence of three years' detention. The distinction was based on the view that:

the transient, vulnerable, nature of the American population specifically targeted by the appellant makes it appropriate that, exceptionally, an anti-social behaviour order should here be made, notwithstanding the imposition of a substantial prison sentence.<sup>11</sup>

Whether or not one agrees with this characterisation of US army personnel, the responsibility for anti-social behaviour here was clearly considered distinct from the appellant's criminal liability. The Vice-President's comments make it clear that *Vittles*' targeting of a particular group and the way in which he engaged with that group were

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<sup>9</sup> The defendant contested his sentence and argued that although the anti-social behaviour order was justified in principle, its indefinite length was not supportable. The Court of Appeal rejected his appeal with regards to his sentence but found in his favour in relation to the ASBO. It quashed the length of the order and reduced it to five years, running from the date the sentence was made.

<sup>10</sup> [2004] EWCA Crim 287.

<sup>11</sup> *Vittles* (n 8), [11].

key deciding factors in determining his responsibility for that behaviour,<sup>12</sup> emphasised by the group's perceived vulnerability.<sup>13</sup>

The Court of Appeal took a similar approach when discussing the decision to impose ASBOs on the defendants in *Barclay*. The defendants' pre-existing relationship with the local neighbourhood was described as a 'foothold,' which would enable open street drug-dealing to 'emerge in diverse, transient communities where the criminals involved already have a foothold, and by the use of threats and intimidation to force residents to turn a blind eye.'<sup>14</sup> The necessity of imposing ASBOs was not related to the criminal nature of the behaviour in itself, but was clearly attached to the fact that defendants had exploited their connection to the area in order to foster drug-dealing, purposefully initiating conflict with local authorities, leading to high tension and undermining the community's relationship with the local police to minimise cooperation.<sup>15</sup> They had also coerced, by threats or payment, local vulnerable individuals into taking part in their activities, and actively drive away service providers, which rendered the surrounding area unattractive to new businesses and put existing ones under threat.<sup>16</sup>

The defendants' attitudes showed a clear degree of voluntariness and deliberation in their behaviour, as well as deliberate targeting of this particular local community. Both elements combine to illustrate the defendants' wilful engagement with the community in question, and its central part in determining their individual responsibility, irrespective of their criminal liability.<sup>17</sup> This approach to subjective responsibility builds on but is ultimately distinct from the pre-existing relationship the defendants had with the community in question: by targeting a local neighbourhood

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<sup>12</sup> This reasoning was repeated by the Court of Appeal in the significant case of *R v Boness* [2005] EWCA Crim 2395, [25], also discussed in ch 3 (n 11).

<sup>13</sup> Although it can seem far-fetched to qualify as vulnerable army personnel, the vulnerability in this case seemed to be attached to the foreign nationality of the those targeted by the behaviour, as well as the temporary character of their presence and, it can be presumed, the reason for their being in the area, namely providing a service and being on active military duty.

<sup>14</sup> *Barclay* (n 7), [31]; the defendants all had different ties with the neighbourhood, including having grown up there or having close family connections, although none still lived there by the time of the trial.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*, [32], the judgment refers to specific incidents of the group driving local businessmen away, sometimes through the threat of using guns.

<sup>17</sup> For more details on the difference between the harm done by drug-dealing as a criminal behaviour and the harm done to a particular community as anti-social behaviour, see below text to n 46.

and shaping its behaviour according to that community's characteristics, the defendants were shown to have wilfully engaged with those affected by their behaviour, thereby establishing their responsibility in the context of that relationship.

## **2. Beyond wilful engagement: pushing the boundaries of individual responsibility**

Many of the instances of anti-social behaviour which have led to the imposition of ASBOs concern cases of low-level criminal behaviour.<sup>18</sup> This behaviour's anti-social nature has rarely been questioned, yet in many of those cases, the individual being held responsible has in practice a limited ability to control his behaviour and interact with his social environment. Not only is the existence of a strong enough community relationship questionable, but in those cases, the defendant's condition arguably precludes him from wilfully engaging with those affected by his behaviour, calling into question the imposition of liability.

### ***a) Low-level criminal behaviour as anti-social behaviour***

The courts have on many occasions recognised minor criminal behaviour, such as being drunk and disorderly or begging, as capable of being anti-social. Although most of those cases dealt with variations in the terms of the ASBO or sentencing for breach rather than the anti-social nature of the behaviour, they also provide an insight into how the courts consider the significance of such interactions. In *R v Stevens*<sup>19</sup>, the Court of Appeal was faced with an ASBO being breached, and in his decision<sup>20</sup> the Recorder of Birmingham discussed the anti-social nature of the behaviour of the defendant. It consisted of stealing, being drunk in a public place, using abusive or

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<sup>18</sup> Although there are no available statistics as to the type of behaviour which leads to the use of ASBOs in general, analysis of reported case law conducted for this work suggest that the prevalence of this type of anti-social behaviour is generally reflected in the legal application of the orders, see ch 2, text to n 155 for a discussion of the available data regarding ASBOs.

<sup>19</sup> [2007] EWCA Crim 1128.

<sup>20</sup> The Court of Appeal found strongly against the appellant's submission that the sentence was manifestly excessive, and upheld the sentencing decision: *ibid*, [9].

insulting language and generally causing trouble and damage to the community. In particular, he emphasised its effect as a 'considerable interference with the liberty of other members of the public when this sort of behaviour is allowed to go unchecked.'<sup>21</sup> This discussion reflects the general position adopted by the courts when dealing with low-level criminal behaviour and drunk and disorderly conduct. It shows the seriousness with which such behaviour is treated, and highlights the perceived interactive element of the behaviour as a reason for imposing liability: the defendant is considered as having engaged with those affected by his behaviour in a way which interferes with their interests and justifies the use of an ASBO for their protection.

This approach to the interactive nature of that particular type of behaviour is illustrated in *Cooke*,<sup>22</sup> where a young man was found to have behaved in an anti-social manner 'by begging aggressively in Northampton Town Centre, being aggressive to police officers and self-harming.'<sup>23</sup> He was given an ASBO, which was challenged on the claim that mental health issues affected his ability to understand and conform to the terms of the order, and rendered it unnecessary. The High Court accepted this reasoning in principle,<sup>24</sup> but found that the order in this case was necessary and should be upheld. Dyson LJ highlighted the right of members of the public and local workers to not be caused harassment, alarm or distress, and paid particular attention to the fact that Mr Cooke chose places to beg where he might have more success.<sup>25</sup> These apparent decisions to maximise the impact of his begging, including changing location and self-harming, played a significant role in the determination of Cooke's responsibility.

#### ***b) Mental capacity and the ability to wilfully engage with others***

Despite these findings of liability, examples of low-level criminal and anti-social behaviour also raise the question of defendants' mental capacity in relation to their

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<sup>21</sup> *Stevens* (n 19), [7].

<sup>22</sup> *R (on the application of Cooke) v Director of Public Prosecutions* [2008] EWHC 2703 (Admin).

<sup>23</sup> *ibid*, [2].

<sup>24</sup> The question of mental health issues in relation to anti-social behaviour and the use of ASBOs is discussed in the next section (n 31).

<sup>25</sup> *Cooke* (n 22), [6]-[7].

ability to wilfully engage with others. In *Cooke*, Dyson LJ reiterated the rule that ASBOs cannot be granted unless the defendant is incapable of complying with it, adding that a decision on those grounds can only be given if the defendant lacks the mental capacity to understand and comply with the order.<sup>26</sup> According to his statement, the failure or inability of the defendant to control his behaviour in the context of an ASBO should therefore represent a clear barrier to imposing liability and would render the order unnecessary in practice.

However, the assessment of the defendant's mental capacity in practice does not appear to match this reasoning. In *Cooke*, the High Court found that the defendant showed capacity to understand and comply with the orders, despite his facing clear mental health issues directly relating to his behaviour. The court found that the fact that he had chosen to beg at specific locations demonstrated his ability to make choices and think rationally, and his possession of a Stanley knife was accepted as further evidence of his anti-social behaviour, despite the fact that it had only been used for self-harming.<sup>27</sup> In the related case of *Fairweather*, the High Court stated that to render an order unnecessary, the incapacity to comply with or understand the order had to be complete.<sup>28</sup> According to the District Judge, this meant that the defendant did have the capacity to understand the order as she was neither 'a child nor [was] she mindless,' even though she was 'of low intelligence, has limited literacy skills and [was] frequently intoxicated.'<sup>29</sup> As a consequence, although the defendant was in fact highly likely not to comply with the ASBO, she could theoretically do so and therefore was held liable for her behaviour.

The defendants' mental capacity was demonstrated in both cases by medical evidence, although the way it was discussed focused specifically on their ability to control their behaviour and not their ability to interact socially and wilfully engage with those affected by it. Yet in both cases, it appears that the defendants' mental capacity would have significantly affected the latter: not only can the voluntariness of the defendants' behaviour be called into question, but it also appears dubious that they could be found to be truly engaging with a particular community. In *Cooke*, the

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<sup>26</sup> *Cooke* (n 22), [12].

<sup>27</sup> *ibid*, [7].

<sup>28</sup> *Fairweather v Commissioner of Police for Metropolitan* [2008] EWHC 3073 (Admin).

<sup>29</sup> *ibid*, [16].

defendant's substance dependency problems and self-harming played an important part in his behaviour being qualified as anti-social. Moreover, his behaviour and the way he carried it out did not indicate that he was engaging in any significant way with the specific community affected by his behaviour, in this case commuters walking past him on a busy street.<sup>30</sup> Similarly, while Ms Fairweather's learning disability and alcohol dependency might not negate her capacity to stand trial or distinguish between yes and no, it would affect her ability to interact with others in a meaningful way, both in terms of the voluntariness of her behaviour and her capacity to engage with a particular community.<sup>31</sup>

The question of mental capacity remains a subtle question of fact to be determined on a case-by-case basis, but these cases suggest that decisions regarding the use of ASBOs often still rely on traditional conceptions of subjective individual responsibility when considering mental capacity, rather than examining an individual's engagement, wilful or otherwise, with the community affected. These cases therefore appear to misapply the principles of community-based liability identified in this thesis and ignore the notion of wilful engagement as a marker for individual responsibility, creating a situation where considerations of an individual's mental capacity are likely to be sacrificed to the protection of the community.<sup>32</sup> The following section will examine how the notion of community relationships and their protection from harm has been applied in practice in ASBOs.

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<sup>30</sup> In addition to the defendant's possible lack of wilful engagement, the existence of a specific community with identifiable protected interests is also questionable.

<sup>31</sup> Cases such as these are not isolated incidents: often, the defendant's alcoholism or drug addiction will be the very reason for the behaviour, the former affecting her self-control or the latter necessitating a steady income of cash to fund the habit. A 2002 official study of ASBOs found that in the cases it had reviewed, 'almost a fifth had a drug abuse problem and a sixth a problem with alcohol,' Siobhan Campbell, 'A review of ASBOs' (Home Office Research Study 236, 2002), 18, table 2.7. In the absence of more recent figures, it is difficult to make a definitive statement about the actual incidence of such mental health issues in cases of anti-social behaviour, although there is strong anecdotal evidence that it plays an important role; in particular Sainsbury Center for Mental Health, 'Anti-Social Behaviour Orders and mental health: the evidence to date' (paper in response to the Sentencing Guidelines Council consultation on breach of an Anti-Social Behaviour Order 2007). No matter how high the correlation, 'it is not always clear, however, in which direction causality lies,' Campbell, 18.

<sup>32</sup> This issue also raises the question of whether the test for mental capacity should be the same as with traditional criminal liability, which is far from being considered satisfactory, see Ronnie Mackay, 'Ten more years of the insanity defence' (2012) 12 Crim LR 946 for a recent appraisal.



## **B. Community Relationships and Protected Interests: Finding Harm in ASBOs**

The stated aim of the introduction of ASBOs was to provide a remedy for behaviour which was not caught by either civil or criminal liability.<sup>33</sup> Politicians discussing ASBOs spoke of the acts of rowdy teenagers and noisy neighbours and lamented the fact that they could not be prosecuted as crimes, despite their impact on others. That behaviour was framed as falling into a gap, where it would not be caught by existing models of liability, and ASBOs were portrayed as filling a vacuum.<sup>34</sup> Although the nature of community itself was rarely explored in either policy or judicial reasoning relating to the orders,<sup>35</sup> the type of behaviour which would give rise to an ASBO has been shaped by the orders' attempt to regulate an individual's relationship with a given community. The diversity of those relationships is reflected in the open-ended definition of anti-social behaviour, which has provided the courts with a broad judicial discretion and a tool to take into account the harm this behaviour causes a specific community.<sup>36</sup>

In practice, the types of behaviour that have given rise to ASBOs have been more varied than the prevalent stereotypes of noisy neighbours and troublesome youths would suggest. The courts have acknowledged a variety of community relationships to be protected by ASBOs, defined by a range of different interests shared by its members. However, this wide-ranging approach has arguably stretched the notion of community relationships and the harm caused to them too far in some cases, relying on subjective moral judgment rather than the interference with specific protected interests to justify the imposition of liability.

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<sup>33</sup> The Home Secretary at the time called for the orders to 'mix the best of the civil and criminal law,' HC Deb 16 December 1996, vol 287, col 791 (ch 1, n 8).

<sup>34</sup> The orders' political genesis is discussed in more details in chapter 2, and in particular the suggestion of a 'gap' ASBOs were designed to fill, see ch 2, text to n 70.

<sup>35</sup> The role of the concept of community in ASBOs' political background was discussed in chapter 2, and chapter 3 presented the role of the concept of community in the interpretation of the orders by the courts.

<sup>36</sup> When passing the CDA 1998, the government purposefully refused to discuss what type of behaviour would amount to ASB, to ensure flexibility, see ch 1, n 13 and ch 2, n 141.

## **1. More than local: expanding the concept of community relationships**

As was discussed, the courts have interpreted the open-ended definition of anti-social behaviour to take into account the broader context of the behaviour when determining whether it caused harm to a given community, and whether that harm can justify the imposition of liability.<sup>37</sup> This conceptualisation illustrates how a community's specific interests can be taken into account in practice when identifying the harm of anti-social behaviour. Although the local nature of community relationships plays an important part in the application of ASBOs, communities will generally be defined by a broader range of interests when determining the anti-social nature of the behaviour for which an individual can be held liable. Instrumental and emotional interests are often combined with local interests in characterising the communities ASBOs seek to protect, highlighting the diverse nature of community relationships and drawing a clearer picture of anti-social behaviour.

### ***a) ASBOs and the harm to local communities***

Early depictions of anti-social behaviour reflected a stereotypical focus on local community relationships when issuing ASBOs.<sup>38</sup> While interactions defined primarily by local proximity<sup>39</sup> can provide a clear characterisation of a community whose interests have been interfered with—they are objectively identifiable and widely recognised—the impact of anti-social behaviour on a particular community will generally affect a range of interests beyond the purely local. These interests can be related to the enjoyment of a particular neighbourhood, and its residents' concerns for safety or environmental conditions. In this context, behaviour is often deemed anti-social and

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<sup>37</sup> It is behaviour which can be said to "cause or be likely to cause harassment, alarm or distress" section 1(1)(a), CDA 98.

<sup>38</sup> As was discussed earlier, the concept of dual orders was originally specifically aimed at behaviour occurring in council estates and local neighbourhoods, although it was then extended to cover a broader range of communities (ch 2, s 1A1).

<sup>39</sup> The term local is used in preference to 'traditional' interactions as referred to by Cotterrell in his work on the concept of community, see previously ch 4, text to n 159.

harmful not merely because it occurs in a particular area, but because it interferes with the specific interests which define the local community affected by the behaviour.<sup>40</sup>

This is best illustrated by the case of *Barclay*, which dealt with the impact of drug-dealing activities on a local neighbourhood community.<sup>41</sup> In that case, four defendants had pleaded guilty to drug-dealing offences which took place in a particular area of Bristol known as St Paul's. They were given ASBOs with similar terms, containing prohibitions against entering a particular area surrounding St Paul's and associating with a number of specific individuals, including the other defendants, and restrictions to the use of pay-as-you-go mobile phones. The defendants challenged their sentences for drug-dealing along with the orders themselves: they claimed that the ASBOs were not necessary, and that even if they were, they should not be upheld in those terms.<sup>42</sup>

In his judgment, Cranston J. focused on the issue of the necessity of the ASBOs, and concluded that the judge was correct in finding that the statutory requirement of necessity for an order was satisfied. He paid particular attention to the statement of a police sergeant working in the area, which described the consequences and operations of the defendants' drug-dealing, and focused on detailed examples of how their actions affected the neighbourhood in question, beyond the fact that it took place in the area.<sup>43</sup> The judgment distinguishes between the behaviour's criminal and anti-social nature, drawing a slightly wider net for the latter to consider behaviour which accompanies drug-dealing. In fact, 'open drug-dealing in itself constituted only part of the problem, since there were the other factors conducive to an environment in which it could flourish.'<sup>44</sup> This environment was cultivated by a number of activities and behaviour which caused 'misery, fear and frustration to the area's residents,' and could 'undermine a community's cohesion.'<sup>45</sup>

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<sup>40</sup> The notion of interests as defining a particular community was presented in the previous chapter's discussion of community as a 'web of understanding', as developed by Cotterrell; see ch 4, n 159.

<sup>41</sup> *Barclay* (n 7).

<sup>42</sup> In particular, the defendants raised the issue that the terms of the orders followed a standard model adopted by the police when dealing with drug-related behaviour in that area. The police were running an operation called 'Operation Polar' in the St Paul's area of Bristol; *ibid*, [23].

<sup>43</sup> The Court of Appeal refers to a number of specific police reports in relation to the case, but focuses in particular on a statement by Police Sergeant Aston regarding the impact of drug dealing on the neighbourhood; *Barclay* (n 7), [31]-[36].

<sup>44</sup> *ibid*, [34].

<sup>45</sup> *ibid*, [31].

In this case, the criminal nature of the behaviour can be clearly identified by the principles of traditional criminal liability: the sale of drugs affects the interests of individual members of society in general, for instance by causing a risk of death to others and profiting from the sale of illegal and harmful substances. In contrast, anti-social behaviour which makes the individual responsible to a community is determined by its impact on that community and its interference with relevant protected interests, such as the enjoyment of the local neighbourhood, or the ability to lead a communal life free from threats and interference. Specific facts in *Barclay* showed the impact of the defendants' behaviour on those living in the area in which they dealt drugs, ranging from intimidation and threats to deliberately damaging the environment of the neighbourhood. While many of these consequences overlapped with the 'criminal' harm of drug-dealing, the harm of drug-dealing as anti-social behaviour was clearly defined differently from its criminal nature; it was not considered harmful in general, but deemed harmful to that local community.

Taking a different perspective can help highlight how the behaviour in this case is constructed as harmful to the community's specific interests. If the defendants had organised their drug-dealing activities differently, for example running a more sophisticated, business-like enterprise which involved little or no harm to the neighbourhood in which they operated, and maybe even benefited the area in question, their behaviour would still be harmful to society in general, according to criminal law, and could lead to the imposition of criminal liability. However, it would most likely not be found to have harmed the community's interests in enjoying their neighbourhood safely or lead a fulfilling communal life, in which case it would not justify the imposition of ASBOs and community-based liability.<sup>46</sup>

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<sup>46</sup> This distinction regarding the impact of drug-dealing was recognised in an empirical study looking at an inner-city community's perception of the harm of anti-social behaviour. Drug dealing was not seen as problematic per se, but its anti-social nature depended on proximity and the place of dealing. See John Cromby and other, 'Constructing Crime, Enacting Morality: Emotion, Crime and Anti-Social Behaviour in an Inner City Community' (2010) 50(5) *Brit J Criminology*, 873, this study is also discussed in more details in chapter 4 (n 176).

**b)      *Specifying the harm to community relationships:  
instrumental and affective interests***

The breadth of the definition of anti-social behaviour in the CDA and its subsequent interpretation has opened the door to ASBOs being used to protect communities which are not necessarily based on locality. In keeping with the recognition of more specific interests to define the harm caused to local communities, ASBOs have also been granted to protect communities which are defined by their shared instrumental or affective interests, irrespective of any local characteristics.

(1)      Communities and instrumental interests

The protection of a community's instrumental interests through the imposition of an ASBO is well illustrated in another case concerning animal activists running a campaign targeted at a laboratory running scientific experiments on animals.<sup>47</sup> In order to impede its activity, the defendants targeted the laboratory in question, as well as a range of individuals and companies who were in some way associated with it. They published their details to enable others to harass them, and informed them that if they ceased to work with the laboratory in question, the harassment would stop. Most of the activities involved a criminal element,<sup>48</sup> but their anti-social nature was determined by the explicit and direct targeting of a group of individuals and organisations.<sup>49</sup>

The ASBO was designed to protect a community which revolved around its members' involvement with the company originally targeted: the protected interests which drew this community together, and which were harmed by the behaviour, were defined by their professional association. Those interests included the organisations'

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<sup>47</sup> *R v Avery and Others* [2009] EWCA Crim 2670.

<sup>48</sup> They represented 'activities of harassment, which included the following: false allegations of paedophilia communicated to neighbours and friends; hoax bombs; the sending of sanitary towels allegedly contaminated with the AIDS virus; demonstrations at, and damage to, the homes of staff members; the threat of, or the actual commission of, criminal damage to property; the threat of physical assault; threatening and abusive telephone calls, emails and letters; noisy protests outside the premises; disruptive trespasses into premises (including in some cases aggravated trespass); the co-ordinated sending of emails or telephone calls, so as to block the company's email and telephone systems, which caused serious disruption of business; and organising the delivery of unwanted material from mail order companies,' *ibid*, [7].

<sup>49</sup> This type of behaviour also clearly demonstrates the existence of a wilful engagement on the part of the individual being held liable.

common instrumental interest in collaborating with this company, as well as an interest in carrying out their business free from intimidation and possibly a subsidiary interest based on locality.<sup>50</sup> This combination of factors made them an identifiable community of business organisations and individuals, based principally on common instrumental business-related interests. Interference with those interests would constitute anti-social behaviour harmful to that particular community, and could engage the responsibility of the protester in his relationship with it.

The specificity with which a particular community's interests will be assessed has also led, in some decisions, to a denial of liability because of an absence of relevant harm to that community, as defined by its protected interests. In the case of *Mills*, the High Court found that although shoplifting could in principle constitute anti-social behaviour and call for the imposition of an ASBO, it would only do so where it had been carried out in a way which affected the tangible interests of a particular community.<sup>51</sup> The defendant was caught stealing three pairs of gloves from a shop by a plain clothes police officer; she was arrested and charged with theft. It transpired that she had 68 previous convictions for theft and similar offences, and she was given an ASBO which prohibited her from entering a number of retail premises in the local area.<sup>52</sup> The Magistrates' Court focused on the behaviour's impact on the staff, store owners and the public at large, finding that the defendant had acted in an anti-social manner. It relied in particular on a CPS note asserting that shoplifting does cause harassment, alarm and distress to retail and security staff, and that its cost is passed onto the public, causing further harm.<sup>53</sup>

The defendant argued that her behaviour did not amount to anti-social behaviour, and that the terms of the order were too wide. After discussing relevant authorities on the nature of anti-social behaviour, Lord Justice Scott Baker addressed the question as to whether or not the Deputy District Judge was in fact justified to have found that the defendant had acted in manner which caused or was likely to cause harassment, alarm or distress. In doing so, he stated that:

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<sup>50</sup> Most of the behaviour occurred in particular area, although this was not listed by the court as a significant factor.

<sup>51</sup> *R (Mills) v Birmingham Magistrates Court* [2005] EWHC 2732 Admin.

<sup>52</sup> *ibid*, [4].

<sup>53</sup> *Mills* (n 57), [4].

no employee of Next was even aware of the theft until the police officer took the gloves back to the shop and told them; [...] I find it quite impossible to say that by stealing the gloves unbeknown to the store the claimant had done anything that was likely to cause either harassment, alarm or distress within the meaning of the section.<sup>54</sup>

Accordingly, the High Court found that although shoplifting could, in some instances, represent anti-social behaviour within the meaning of the CDA, in this particular case the defendant's behaviour could not be said to contain such characteristics, and the ASBO was therefore unnecessary.<sup>55</sup> This reasoning highlights the courts' consideration not just for the identification of a clear interference with a community's interests, but also for the proper determination of what interests will be taken into account when assessing the harm caused to that community. When evaluating the anti-social nature of the behaviour, Scott-Baker LJ clearly focused on the impact of the behaviour on the employees of the shop in question rather than its impact on the store owners or even the public in general, as had been the reasoning in the first instance decision.

Consequently, the interests defining this particular community relationship would be distinct from the interests which could be held to define another broader community affected by the behaviour, for instance the store owners or the security staff involved in policing the local shopping area. If those instances of community had been considered, then the CPS' argument that the behaviour was anti-social because its cost was passed on to other consumers, and had an eventual impact on detectives and shop assistants, could have been accepted to show that harm had been caused to this community's specific interests, justifying the imposition of liability.<sup>56</sup> In contrast, the community whose interests were considered as requiring protection was restricted to employees working on the floor. Following Cotterrell's categories of community

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<sup>54</sup> *Mills* (n 57), [11].

<sup>55</sup> *ibid*, [12].

<sup>56</sup> A similar argument was raised in front of the Court of Appeal in the case of *Belaid*, in which the defendant had carried out a number of thefts on passengers at mainline train stations. In challenging the imposition of an ASBO, the defendant relied on *Mills* and argued that despite his deliberate targeting of individuals at the station, the defendant's actions were designed specifically to avoid detection by his victims by 'the surreptitious removal of property.' As such, it did not cause any distress beyond that which victims of 'regular' theft would suffer. The order was quashed on the ground of necessity because of the existing custodial sentence, see *R v Belaid* [2008] EWCA Crim 2153, [9].

interests,<sup>57</sup> the protected interests in this instance are essentially instrumental, based on members' professional employment and interest in being safe at work. The defendant's discrete and surreptitious mode of action meant that her behaviour had not interfered with those interests, and that her responsibility towards that community could not be engaged.<sup>58</sup>

As with drug-dealing, shoplifting represents behaviour that is harmful to society, making it a crime, but which can also be harmful to a community for reasons which differ from its broader criminal nature. Shoplifting is harmful and thus criminal for precisely the reasons that were suggested by the CPS in the case of *Mills*: it is a violation of property rights, the cost is passed on to consumers and society in general and it creates an unsafe atmosphere in the store and its surroundings. By contrast, shoplifting would be considered anti-social only if it harmed the community directly affected by the behaviour, namely the shop employees. If, for instance, the shoplifter used threats and intimidation against staff and customers, or was regularly confronted for his behaviour, leading to loud arguments in the store, the behaviour could be deemed anti-social. Namely, it would then affect the interests of the community of shop employees, as identified by the court in *Mills*, and cause it specific harm. An ASBO would then be justified to protect that community, provided the shoplifter had also been proved to have wilfully engaged with it.

## (2) Beyond instrumental interests: recognising affective and emotional interests

Emotional and affective interests have also been recognised as worthy of protection through the use of ASBOs in certain cases. In the case of *Vittles*, discussed previously,<sup>59</sup> the defendant had targeted US airbase personnel. That community is arguably defined by local and instrumental interests: they lived in the area and were employed on the base. However, the court's reasoning also explicitly considered a

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<sup>57</sup> Ch 4, text to n 159.

<sup>58</sup> The Court of Appeal adopted a similar approach in relation to sentencing for shoplifting, holding that 'shoplifting by isolated individuals, not accompanied by threats or violence, albeit a nuisance, particularly to shopkeepers, is not dangerous or frightening, nor does it, particularly when compared with many other offences, damage the confidence of the public,' *R v Page* [2004] EWCA Crim 3358, [3].

<sup>59</sup> *Vittles* (n 8).



different aspect of the community, based on the ‘transient, vulnerable nature of the American population specifically targeted by the appellant.’<sup>60</sup> This characterisation speaks to a more emotional or affective interest linking its members together, and with which the behaviour had interfered. In those communities, the vulnerability of members can create a stronger bond between them and define the nature of their relationship, highlighting their increased need for protection and safety.

The role of vulnerability<sup>61</sup> in defining a community’s protected interests was invoked more convincingly in the case of *Gilbertson*, which dealt with fraud by misrepresentation.<sup>62</sup> The defendant was found to have made a series of cold-calls to the homes of two elderly ladies and persuaded them to hire him to carry out works to their roof. They were charged around £200 each when in fact little or no work had been done. He was found guilty of fraud and unfair trading offences, and was given a suspended prison sentence, as well as an unpaid work requirement and a curfew. In addition, the court imposed an ASBO, to last for two years. Because of the suspended sentence and other measures, the ASBO’s terms were found to be unnecessary and disproportionate and the order was eventually quashed.

The Court of Appeal did however recognise the anti-social nature of the defendant’s behaviour, and the fact that it could in principle justify the imposition of an ASBO, because of ‘the way [it was] against vulnerable elderly householders.’<sup>63</sup> The fact that the defendant had specifically targeted the women and selected them because of their old age and vulnerability played an important part in making the behaviour harmful and anti-social in this case. The community in question could therefore require protection for the harm caused to it, based on a combination of local and affective interests: the women’s residence, age and frailty made them more susceptible to being caused harm as a community by this behaviour, which was carried out specifically to target them.<sup>64</sup>

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<sup>60</sup> *Vittles* (n 8), [11].

<sup>61</sup> Even though the vulnerable nature of the US airbase personnel in this case may seem overstated, for more details, see above, text to n 15.

<sup>62</sup> *R v Gilbertson* [2009] EWCA Crim 1715.

<sup>63</sup> *ibid*, [11].

<sup>64</sup> Despite clear identifiable interests, the scope of the community in question may appear relatively small in this particular set of facts, as only 2 women were in fact targeted. However, had an ASBO been deemed necessary, it would have served to protect a broader community, composed of other elderly and vulnerable residents of the local area.

In practice, affective or emotional interests will play a part in most cases when determining whether behaviour will be harmful to a community and thus anti-social. A local community's interest in living together in a particular area will often be based on an interest in enjoying the community safely and peacefully,<sup>65</sup> and shop employees' interest in carrying out their job is not necessarily purely instrumental, but also reflects a more affective or emotional interest to do so free from intimidation or fear.<sup>66</sup> Even in the case of a corporation and related organisations being protected from harassment, the interests protected would relate to some extent to the emotional impact of the behaviour against members of that community.<sup>67</sup> The existence of emotional and affective ties will play an important role in many communities, and any interference with those interests is likely to cause clear harm to those communities.<sup>68</sup> However, the subjective nature of some of these interests can raise concerns as to their role in assigning liability for individual behaviour, as will be discussed in the following section.

## **2. Stretching the reach of community interests towards imposing subjective moral judgments**

Despite the courts' recognition of specific protected interests as a defining element of community-based liability in ASBOs, some examples also show that the value of that specificity can sometimes be lost when the relevant community relationship is too broadly defined. In those cases, liability runs the risk of being determined by moral or subjective judgments over the perceived harm of the behaviour in question, rather than being determined by its interference with clearly identifiable interests. Graffiti and prostitution are two examples of behaviour which can be erroneously labelled as harmful to a particular community because of the general offense it causes, rather than any specific interference with that community's interests.

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<sup>65</sup> See for example *Barclay* (n 7), the drug dealing case.

<sup>66</sup> See for example *Mills* (n 51), the shoplifting case.

<sup>67</sup> See for example *Nicholson* (n 3), and *Avery* (n 48), the animal activist cases.

<sup>68</sup> The importance of emotional and affective interests in determining the harmful nature of anti-social behaviour can be mirrored in the emotional nature of a community's response to anti-social behaviour, as shown by an empirical study conducted with an inner-city community in Cromby and others (n 46).

**a) Graffiti as anti-social behaviour: protected interests or subjective judgment?**

Graffiti painting is often used as one of the archetypal examples of anti-social behaviour, along with playing loud music and terrorising neighbours. Its local context conjures up familiar concerns for the safety and appearance of our neighbourhoods, and it has even been associated with more severe crime and disorder.<sup>69</sup> As such, it seems easy to imagine a situation in which graffiti paintings could amount to an interference with a community's protected interests, causing it harm and thereby justifying the responsible individual being held liable for his behaviour. For instance, repeated graffiti in a public staircase which obscures windows, blocking out the light and exhibiting allegiance to local gangs, could easily be found to harm a community made up of residents of that building, because of the unsafe atmosphere it would create.<sup>70</sup> However the courts' use of ASBOs in cases relating to graffiti painting suggests a more complex and potentially controversial position in this area, one which apparently fails to consider the actual harm caused to specific communities. The Court of Appeal's general position regarding graffiti is that it 'may well be such as to be likely to cause distress' and thus represent anti-social behaviour, and that general evidence to that effect would be sufficient for the court to 'make its own assessment.'<sup>71</sup>

In criminal liability, the harm attached to graffiti painting is generally well-accepted by the courts, based on the damage caused,<sup>72</sup> as well as the often important cost to clean and repair the graffiti.<sup>73</sup> In contrast, when considering the anti-social nature of graffiti, the courts have given little consideration to the specific harm caused to the communities affected by those paintings in each case. Significantly, cases dealing with graffiti generally assume the public's negative reaction without carrying

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<sup>69</sup> For a discussion of graffiti and similar behaviour as anti-social behaviour, see Andrew Millie, 'Anti-Social Behaviour, Behavioural Expectations and an Urban Aesthetic' (2008) 48(3) *Brit J Criminology* 379.

<sup>70</sup> That example was mentioned in the previous chapter, see ch 4, text to n 75.

<sup>71</sup> *R v Brzezinski* [2012] EWCA Crim 198, [26].

<sup>72</sup> In another case, the Court of Appeal emphasised 'and it [is] *damage*' in *R. v Charan Verdi* [2004] EWCA Crim 1485 [3] (original emphasis).

<sup>73</sup> In *Verdi*, the judgment refers to evidence before the Crown Court from London Underground, claiming that it spends £10 million a year removing graffiti, (ibid, [4]). In other cases, costs often run up in the tens of thousands of pounds, eg over £20,000 overall in *R v Dolan and Whittaker* [2007] EWCA Crim 2791, [3] and £40,000 in *R v Moore* [2011] EWCA Crim 1100, [5].

out a detailed evaluative exercise as with other cases relating to ASBOs.<sup>74</sup> In *Brzezinski*, the Court of Appeal referred to a report by the prosecution which described the effects of graffiti on communities in general, and included testimony from two individuals attesting to the 'unsightly' and 'intimidating' nature of graffiti.<sup>75</sup> However, the breadth of the report did little to provide evidence of a specific community whose interests would be protected from interference by an ASBO, and conveyed little more than a general sense of offense resulting from the behaviour. Whilst other cases dealing with this type of behaviour generally mention a range of factors characterising graffiti as anti-social behaviour, none refer to the specific reaction of the communities directly affected by the paintings.

This was reinforced by the fact that many of the graffiti paintings were on trains and public transport rather than in particular neighbourhoods.<sup>76</sup> Despite the absence of a specific community whose interests were being interfered with, these cases found that this behaviour could, and in fact often did, amount to anti-social behaviour. In a joint case which dealt with the necessity of imposing an ASBO for extensive graffiti paintings, the Court of Appeal appeared to confirm the significance of the offensive or threatening character of the graffiti when assessing its harmful and anti-social nature.<sup>77</sup> The final decision was that despite the criminal nature of the behaviour, it did not warrant the imposition of an ASBO.<sup>78</sup> The Court acknowledged the high cost of removing the graffiti in both cases, but found that an ASBO was not necessary, because of the fact that the 'nature of the material was not threatening or offensive.'<sup>79</sup>

Perhaps more importantly, the attitude of the defendants when painting the graffiti also played an important part in this assessment. In *Dolan and Whittaker*, both defendants were recognised by the Court of Appeal as 'skilled graffiti artists,' who 'exercised their skills' within the 'graffiti subculture.'<sup>80</sup> It is clear from Grigson J's judgment that the artistic endeavour behind the graffiti played an important part in his assessment of the behaviour. Each defendant had very positive pre-sentence reports,

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<sup>74</sup> For instance in *Barclay* (n 7) and *Avery* (n 47).

<sup>75</sup> *Brzezinski* (n 71), [23].

<sup>76</sup> In one case, the Court of Appeal referred to the community being protected by those orders as the 'travelling public,' see *R v Austin and Ors* [2009] EWCA Crim 394, [5].

<sup>77</sup> The CA adopted a reasoning similar to that in *Moore* (n 73).

<sup>78</sup> The defendants had both pleaded guilty to the criminal charges, *Dolan and Whittaker* (n 73).

<sup>79</sup> *ibid*, [11].

<sup>80</sup> *Dolan and Whittaker* (n 73), [3] and [4].

and the decision referred to Dolan's artistic career.<sup>81</sup> The facts of that case were distinguished in *Brzezinski*, which dealt with graffiti on a number of trains. Although the cost of the graffiti in this case was roughly comparable with other cases, and the Court recognised there was little offensive material in the instances of graffiti which led to the imposition of an ASBO,<sup>82</sup> Davis LJ held that the behaviour amounted to anti-social behaviour and could justify the imposition of an order. In a direct reference to the decision in *Dolan and Whittaker*, he observed that 'if there is a perception in some quarters that unless graffiti is of a kind as to be explicitly obscene or threatening then an Anti-Social Behaviour Order can never be justified, such perception should be displaced,' and affirmed that the Court should be able to make its own assessment of whether the graffiti could be described as anti-social.<sup>83</sup>

The combination of factors which were considered in those decisions could all arguably represent a harmful interference with a community's protected interests. The cost of removing graffiti can affect local residents or even users of a transport system if the cost is passed on, whereas the offensive or threatening nature of the painting can interfere with a local community's enjoyment of their neighbourhood and sense of safety, thus causing it harm distinct from the generally offensive or criminally harmful nature of the graffiti. However, these factors were not explicitly considered in relation to a given community in these cases, nor do they appear to have been pivotal in the decision to impose liability through the use of an ASBO.

In fact, the essential difference between the case of *Dolan and Whittaker*, where the ASBOs were quashed, and *Brzezinski*, where the order was maintained, appears to be the subjective assessment by each court of the artistic value of the graffiti. In the latter case, the graffiti consisted mainly of a series of tags made up of various words, which the Crown Court had found to be 'ugly, defacing of public property and pure vandalism in its worst form,' and commented that there was 'not a scrap of artistic merit in them.'<sup>84</sup> The lack of artistic endeavour clearly played an important role in the judge's assessment of the behaviour, Davis LJ even qualifying the behaviour as

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<sup>81</sup> *Dolan and Whittaker* (n 73), [5].

<sup>82</sup> 'none of the graffiti was obscene or threatening, and in effect constituted solely tags; although we were told that in one instance the words "fuck the police" had been used,' Davis LJ in *Brzezinski* (n 71), [20].

<sup>83</sup> *Brzezinski* (n 71), [26].

<sup>84</sup> *ibid*, [11].

‘attacking trains’ rather than any sort of attempt at artistic expression.<sup>85</sup> This negative appraisal of the tags, and even the qualification of tags itself, is in stark contrast with the terms used to refer to the graffiti in the cases of Dolan and Whittaker, which spoke of artistry and skills.

Rather than identifying the harm caused in relation to the interests which define the communities affected by the behaviour and whether they have been interfered with, in each case the graffiti’s anti-social nature appears to have been determined by a subjective judgment regarding its artistic value and the perceived offensive nature of the graffiti. While such judgments may seem relatively uncontroversial and even trivial, their outcomes will often determine whether or not an ASBO can be granted to control the individual’s behaviour, with potentially serious consequences.<sup>86</sup> In doing so, these cases seem to place the value of protecting community relationships above that of preserving of individual autonomy. In addition, the risks created by this imbalance can be compounded where the lack of consideration of a specific community context occurs in more morally contentious situations, such as, for example, prostitution.

***b) From protected interests to moral judgments:  
ASBOs and prostitution***

In the early years of the CDA, ASBOs were used in certain areas to target on-street sex workers, often in conjunction with other civil or criminal measures.<sup>87</sup> While those cases were and have remained relatively infrequent, the use of ASBOs in that context highlights how the principles underlying a community-based model of liability can be misapplied. In this example, the community whose interests were considered was too broadly defined, and the harm caused to it not defined specifically enough. The imposition of ASBOs in this context appears to rely purely on the offensive nature of

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<sup>85</sup> *Dolan and Whittaker* (n 73), [24].

<sup>86</sup> The maximum sentence for breaching an ASBO is up to five years in prison, CDA 1998, s 1(10).

<sup>87</sup> For more details, see Helen Jones and Tracey Sagar ‘Crime and Disorder Act 1998: prostitution and the anti-social behaviour order’ (2001) 11 Crim LR 873, and Tracey Sagar, ‘Tackling on-street sex work: Anti-social behaviour orders, sex workers and inclusive inter-agency initiatives’, (2007) 7(2) *Criminology and Criminal Justice*, 153; see also Marianne Hester and Nicole Westmarland, ‘Tackling Street Prostitution: Towards a holistic approach’ (Home Office Research Study 279, 2004) which discusses the inconclusive results of the use of ASBOs to tackle prostitution.

the conduct, and its violation of social and moral norms rather than any actual harm caused to the interests of a specific community.

In *Potter*,<sup>88</sup> the High Court dealt with a challenge to a decision by the Preston Magistrates' Court to refuse an ASBO against a street sex worker.<sup>89</sup> The application for an order was sought by the Chief Constable of Lancashire against Ms Potter, on the basis of her acting as a sex worker on residential streets in Preston.<sup>90</sup> This application was rejected by the Deputy District Judge, principally because, when applying the criminal standard of proof to the existence of behaviour 'causing or likely to cause harassment, alarm or distress,' he found that the behaviour of the respondent had to be considered independently from others' behaviour and could not be said to have such effect in and of itself.<sup>91</sup>

In the appeal decision, Lord Justice Auld's judgment considers and discusses in great detail the decision of the Deputy District Judge before allowing the appeal. It becomes clear on reading the case that each judge adopts a different approach to the defendant's individual responsibility in the context of a community relationship. Although the first instance judge recognised the overall impact of prostitution in the area of Preston concerned, he attached greater importance to the subjective responsibility of the respondent when considering whether her behaviour could be labelled as anti-social according to the CDA. The judge admitted that the respondent's behaviour and presence had in itself been contributing to the problem experienced by the neighbourhood overall, but his decision focused on the responsibility of the respondent independently from any other consideration.<sup>92</sup> His reasoning for refusing the application focused on the need to abstract the respondent's specific behaviour from its wider context when determining responsibility, and concern for the fact that the defendant's responsibility could flow from the behaviour of others. In his decision to allow the appeal and remit the matter to the Deputy District Judge however, Lord Justice Auld made it clear that this focus on independent individual responsibility did not lead to an appropriate interpretation of the terms of the CDA defining the nature

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<sup>88</sup> *Chief Constable of Lancashire v LM Potter* [2003] EWHC 2272 (Admin).

<sup>89</sup> The magistrates' court decision is unreported, but quoted at length in the High Court decision.

<sup>90</sup> *Potter* (n 93), [1].

<sup>91</sup> CDA 98, s 1; the criminal standard of proof was decided in *McCann*, see ch 1, n 16.

<sup>92</sup> Magistrate's decision, as quoted in *Potter* (n 88), [37].

of anti-social behaviour. In his account of the facts, he referred to the general situation of the neighbourhood and the problems caused by prostitution in the area, including 'aggravated conduct' which sometimes occurred and its impact on:

respectable women [who] might, on occasion and in certain circumstances, have found it an uncomfortable experience to walk in those streets as a result of seeing some of that activity, or of being stared at or approached by a kerb crawler, or of encountering drunken men looking for prostitutes.<sup>93</sup>

Having acknowledged that not all on-street prostitution would be recognised as anti-social behaviour, and that the activities of the respondent herself might not be considered to constitute such behaviour, Auld LJ highlighted the need to assess the impact of those activities in the context of the general problem of the particular area. If it was recognised that prostitution in a particular area created a problem because of the 'cumulative effect' of such activities, then 'the fact that any one of the prostitutes contributing to that effect might have faced a strong case under section 1(1)(a) was simply a proper and intended consequence of the provision in that context, not a reason for not giving it effect.'<sup>94</sup> Individual responsibility for this behaviour should take into account the wider context of the problem, as a matter of fact and degree, and the Deputy District Judge should have considered the effect of the respondent's actions not only in isolation, but also in relation to the behaviour of other prostitutes when determining if it could justify the imposition of an ASBO.<sup>95</sup>

These two decisions therefore represent two very different approaches to the imposition of liability in this case: whereas the Deputy District Judge focused on the individual impact of the particular respondent's behaviour in order to determine its anti-social and potentially harmful character, the Court of Appeal explicitly took into consideration the wider situation in the context of an ongoing problem affecting a local community. At first glance, Auld LJ's approach appears to reflect the defining elements of community-based liability in holding the respondent responsible for harming the community. In this instance, the community in question would be characterised by its local character and its members' interest in enjoying their local

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<sup>93</sup> *Potter* (n 88), [37].

<sup>94</sup> *ibid*, [44].

<sup>95</sup> *ibid*, [48].



neighbourhood and feeling safe. If we follow this reasoning, the orders could hypothetically be justified by the fact that, by soliciting on the streets, the individual was found to interfere with those interests and potentially cause harm to the community, creating insecurity, causing women to fear for their safety and generally increasing the red light character of the neighbourhood.

However, this decision did not identify the specific harm caused to this community. Rather, it considered a broader notion of community and adopted an objective rather than specific appreciation of the harm caused by prostitution. Not only was the behaviour of the defendant explicitly considered in the general context of prostitution, but many of the consequences attached to the behaviour appeared to be speculative.<sup>96</sup> The fact that prostitution is a morally, socially and legally controversial issue further muddies the water when considering a community's reaction to it,<sup>97</sup> and any potential harm it can cause to that community. This context arguably raises the stakes in relation to a decision of liability: to protect the balance between individual autonomy and the protection of community relationships, the specific interests being protected should be clearly identified in relation to a given community and the harm caused to it should represent more than just a general sense of offense.

Moreover, the partial decriminalisation of the behaviour<sup>98</sup> means that the imposition of liability through ASBOs could effectively bypass Parliament's will not to use custodial sentences for prostitution.<sup>99</sup> Although there is little evidence of a widespread use of ASBOs to target prostitution,<sup>100</sup> this example highlights the possible misapplications of a model of liability based on an individual's relationship with a particular community. Whilst the identification of specific protected interests can provide an adequate basis for determining the harm caused to that community and thus for imposing liability, a broad conception of community interests can lead to

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<sup>96</sup> For example, his account of how women may feel at night travelling through the area or being solicited; see above, n 93.

<sup>97</sup> Beyond the justification for imposing ASBOs to tackle prostitution, the value and efficiency of using the orders can also be questioned from a practical perspective as sex-workers targeted by anti-social behaviour orders were more likely to 'go underground' or change where they worked rather than observe the terms of the order; see Jones and Sagar (n 87) and Sagar (n 87).

<sup>98</sup> Criminal Justice Act 1982, s 71 abolished the use of custodial sentences for soliciting offences and limited available sanctions to fines.

<sup>99</sup> This argument is developed by Jones and Sagar (n 87), as well as Sagar (n 87).

<sup>100</sup> Tracey Sagar 'Public Nuisance Injunctions against on-Street Sex Workers?' (2008) 5 Crim LR 353 refers principally to the use of public nuisance injunctions rather than ASBOs to target prostitution.

situations where liability becomes little more than the imposition of subjective or moral judgments, with little concern for individual responsibility.

## **II. ASBOs and Community-Based Liability: Reframing the Orders' Dual Nature**

The first chapter of this work set out a hypothesis regarding the role of the concept of community in the way ASBOs imposed liability. It distinguished the orders from both civil and criminal liability and proposed that their combination of civil and criminal elements created a unique legal instrument which sought to regulate an individual's behaviour if it caused harm to a given community.

As the past chapters have sought to prove, ASBOs can be seen as the expression of an alternative model of community-based liability, premised on an individual's relationship with a particular community. On one side of that relationship, a responsible individual constituted by his social interactions can be held accountable for the way in which he engages with others around him. On the other side, the notion of community can be characterised as a flexible concept embracing a multitude of incarnations, each characterised by the existence of protected interests shared by its members. If an individual interferes with a community's protected interests while wilfully engaging with that community, he can be held liable for his behaviour.

This approach to liability is reflected in ASBOs, validating the original hypothesis and providing a framework through which to assess the liability applied in the context of ASBOs, as was shown in the previous sections. This analysis of provides a different perspective on ASBOs' purpose, portraying them less as an unprincipled legal mechanism to remedy the imagined failures of existing systems of liability, and more as an effort to regulate individual behaviour from a different perspective. Despite some misapplications, ASBOs and their dual nature have been relatively successful in pursuing that purpose, by focusing on the relationship between an individual and a particular community to target behaviour that is harmful to that community. From this perspective, ASBOs' use of hybrid civil and criminal elements represents more than a

legal tool to target a 'gap' between civil and criminal law: it enables a flexible approach to the different types of individual/community relationships which will form the basis of liability, and its communicative nature focuses on enhancing that relationship through the use of the orders.

## **A. Flexibility in ASBOs: Matching the Community Relationship**

The first way in which the dual nature of ASBOs helps to achieve their purpose lies in the flexibility it provides. The use of a civil injunction to target anti-social behaviour and that concept's open definition has led to a legal mechanism which can mirror the specific circumstances of each given case. The value of specificity and flexibility in the imposition of liability reflects a communitarian vision of individual responsibility, and its focus on the constitutive nature of social relations.

### **1. Flexibility in ASBOs' dual nature**

Chapter three explored the role of the concept of community in the application and interpretation of ASBO legislation. The courts' pragmatic approach to ASBOs has complemented the judicial discretion inherent to the CDA to promote flexibility in their application, and contributed to creating a case-by-case approach to the imposition of liability. This approach informs all stages of ASBOs, from their general interpretation<sup>101</sup> to the possible terms of the initial civil injunction<sup>102</sup> and the flexible procedural requirements when applying for an order.<sup>103</sup> This pragmatic take is also reflected in the way the courts have dealt with the use of ASBOs on conviction, distinguishing the use of these orders from criminal liability for similar behaviour, and adapting their application to fit the consequences of a conviction.<sup>104</sup>

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<sup>101</sup> The House of Lords in *McCann* called for a pragmatic and evaluative approach to the interpretation of ASBO legislation, see ch 3, text to n 76.

<sup>102</sup> This was emphasised specifically in the case of *Boness* (n 12), as discussed in ch 3, n 83.

<sup>103</sup> There has been no legislation outlining the application procedure to be followed when applying for an ASBOs, as discussed in ch 3, text to n 64.

<sup>104</sup> According to CDA 1998, s 1C(5) the necessity an order on conviction will be related to the nature of the criminal sentence imposed. Its starting date may be delayed to coincide with the defendant's

The government's use of broad concepts and a high degree of judicial discretion allowed by the drafting of the legal provisions set the tone early for the flexible approach to be adopted when applying ASBOs. As was discussed in chapter two, anti-social behaviour was defined in relation to the impact it may have on others, rather than as a specific type of action or course of conduct,<sup>105</sup> as a means to tackle a wide range of behaviour which occurred in different situations. This lack of definition was directly related to the community context of the type of behaviour the orders were designed to target.

The courts' interpretation and application of ASBOs reflect this emphasis on flexibility, both in terms of what behaviour will call for the imposition of an order and the content of the orders themselves. By taking a pragmatic approach to the use and application of ASBOs, the courts have embraced the need to precisely evaluate the behaviour's context, giving a particular attention to the details of each case. This context has been shaped by the relationship between the responsible individual and the community affected by his behaviour, as is reflected in the terms of a given order. Although the legal provisions give little guidance on the possible terms to include in an ASBO, practice has shown that they have to fit the circumstances and context of the behaviour in question.<sup>106</sup> As the JSB guidance points out, the terms of an ASBO should be 'tailored to the defendant and not designed on a word processor for generic use.'<sup>107</sup> This does not mean that the defendant's interests alone are considered in this exercise. In fact, the guidelines set out in *Boness*<sup>108</sup> by the Court of Appeal, while emphasising the need for the ASBO to mirror the circumstances of the individual whose responsibility was engaged, also explicitly encouraged the court to consider the

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release from prison, or it may be deemed unnecessary altogether because of the existence of sufficient licence provisions, see ch 3, n 25.

<sup>105</sup> This is generally referred to as 'context-dependent' harm, as for example with harassment and stalking offences, see ch 2, text to n 43.

<sup>106</sup> CDA 1998, s 1(4) merely states that the court 'may make an order [...] which prohibits the defendant from doing anything described in the order.'

<sup>107</sup> Thomas LJ, 'Anti-Social Behaviour Orders: A Guide for the Judiciary' (Judicial Standards Board, Jan 2007), 15.

<sup>108</sup> *Boness* (n 12); these included, in relation to the terms of an order: the prohibition should be capable of being easily understood by the defendant; the condition should be enforceable in the sense that it should allow a breach to be readily identified and capable of being proved; exclusion zones should be clearly delineated with the use of clearly marked maps; individuals whom the defendant is prohibited from contacting or associating with should be clearly identified.

way the behaviour affected the community, and the relationship between the two parties.

This was reflected in numerous cases, where the terms of the orders were crafted and amended to mirror the circumstances of the relationship in question. For example, in *Avery*, the animal-rights activist case, the restrictions contained in the ASBOs closely mirrored the behaviour and included a number of prohibitions, ranging from the participation in demonstrations to being within 1 mile of the organisation targeted.<sup>109</sup> In addition, a schedule contained a specific list of the companies, organisations or individuals mentioned in the restrictions of the orders. The impact of the behaviour on the targeted organisations evidenced the necessity of imposing an order, and the terms of the order reflected the manner in which they were targeted. The defendant's wilful engagement with the community whose interests he interfered with provided the courts with a clear roadmap to follow when drawing up the terms of the orders.

This flexible approach to liability reflects the value of dynamism and flexibility as it is perceived in communitarian principles, as will be discussed in the following section.

## **2. Liability, community and the value of flexibility**

The influence of communitarian principles in an alternative model of community-based liability diminishes the importance of the liberal ideals of consistency and certainty, and provides a more flexible reading of individual responsibility without necessarily giving way to an unprincipled approach.

The core of the communitarian challenge to liberalism is, as was outlined in the previous chapter, the claim that it is premised on a problematic and potentially naive perception of the individual as a human being devoid of any social characteristic.<sup>110</sup> This atomistic vision of seeks to isolate what is perceived as the essential nature of an individual, and calls for a relatively immutable and static quality of the rules of criminal liability. From a liberal perspective, the recognition of the centrality of community relationships in defining an individual's nature and responsibility therefore presents an

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<sup>109</sup> *Avery* (n 47), [2].

<sup>110</sup> As Lacey points out, the figure of 'an a- or pre-social human being makes no sense,' Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1994), 171.

‘unsettling presence for justice.’<sup>111</sup> However, in a community-based model of liability which embraces the social nature of the individual and his relationship with a given community, the liberal fear of the social gives way to a complex web of related and interacting values and preferences which constitute communities and which need to be recognised in order to reflect the social construction of the individual subject.<sup>112</sup> Pushed to its full conclusion, this approach would call for the recognition of cultural relativity in relation to the fundamental interests to be protected by the law, and the protection not of specific interests, but rather the right and ability of all individuals to pursue those interests.<sup>113</sup>

In the more restricted context of community-based liability and, by association, of ASBOs, the reliance on the relationship between a socially constituted individual and a particular community can be seen as creating less of an unsettling presence for justice and more of a dynamic force. This approach acknowledges the interests not just of the socially constituted individual, but also those of the various communities which exist in our society. As such, it can be seen as enabling citizens to take more control of their lives by ensuring ‘possibilities for all members to participate as full members of the communities to which they belong.’<sup>114</sup> The flexible nature of a community-based model of liability, as expressed in the dual nature of ASBOs, allows the imposition of liability to become the reflection of social interactions, rather than the sole expression of individual actions.<sup>115</sup>

The flexible character of this dual nature and the model of liability it represents recognise the fact that anti-social behaviour will affect different communities differently. The importance of this feature was highlighted in a recent empirical study which examined how communities affected by anti-social behaviour perceived its harmful nature.<sup>116</sup> Not only did communities appear to adopt a generalised perception

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<sup>111</sup> Michael Sandel, *Liberalism and the Limits of Justice*, (Cambridge University Press 1982), 181.

<sup>112</sup> For discussion of this pluralism in practice as ‘consistent pluralism’, see Lacey, *State Punishment* (n 110), 187.

<sup>113</sup> Lacey even goes as far as seeing the possibility for criminal law to operate ‘social engineering’ by legislating ‘somewhat in advance of popular attitudes’ if some major threat to a fundamental interest was evident, Lacey, *State Punishment* (n 110), 111.

<sup>114</sup> Roger Cotterrell, ‘The Rule of Law in Transition: Revisiting Franz Neumann’s Sociology of Legality’ (1996) 5 *Social & Legal Studies* 451, 464.

<sup>115</sup> Lacey, *State Punishment* (n 110), 98.

<sup>116</sup> Cromby and others (n 46).

of the effects of anti-social behaviour, referring to the way it ruined 'our' lives rather than that of specific individuals, their reaction also showed a shared perception within the specific community. Although it was related in moral and seemingly emotional terms, the authors of the study found that the participants' perception of harm was complex and nuanced, and took into account the practical circumstances of the situation to distinguish between crime, incivilities and anti-social behaviour.<sup>117</sup> In particular, the participants in the study discussed the specific example of the harmful nature of drug-dealing in the context of a community. The behaviour was not seen as necessarily problematic per se, but would depend on proximity, place and the type of drug that was sold.<sup>118</sup> This example presents a particularly striking correlation with the case of *Barclay*, in which the anti-social nature of drug-dealing was clearly distinguished from its criminal nature by the Court of Appeal.<sup>119</sup> From a more general perspective, this also highlights the importance of adopting a flexible approach when holding an individual liable. Through the use of dual orders and the flexibility it allows, ASBOs can provide a way to more effectively regulate the individual/community relationship, by focusing on the particulars of the community affected and the way in which the responsible individual relates to that community. This regulation is also enhanced by the communicative function of ASBOs, as will be discussed in the following section.

## **B. Changing the Voice of the Law**

The communicative function of ASBOs is aimed at both parties in the relationship they seek to regulate: the responsible individual and the community whose interests are protected. This dual purpose reflects the communitarian inspiration of a community-based model of liability by changing the communicative function of the orders and encouraging reparation and reformation of the responsible individual in his relationship with a particular community.

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<sup>117</sup> Cromby and others (n 46), 890.

<sup>118</sup> The hierarchy that was established appears to mirror the criminal classification of drugs, with weed and cannabis ranking lower than heroin and crack cocaine, *ibid*, 886, 890.

<sup>119</sup> *Barclay* (n 7).

## **1. The communicative nature of ASBOs**

As was presented in chapter three, the high degree of judicial discretion enshrined in the CDA was used by the courts to reinforce the need for an order to be clear and understandable for each individual, thereby providing him with a clear guide of how to behave in his relationship with a particular community. In addition, the courts' interpretation of ASBO legislation also emphasises the value of publicising orders to those affected by the behaviour.

### ***a) Communicating with the responsible individual***

The requirements of specificity and clarity as to the terms of ASBOs are the principal expression of the orders' communicative function towards the individual whose responsibility is engaged. The terms must set out easy-to-understand guidance on how not to behave in a particular context, tailored to the characteristics of the individual recipient and capable of being understood by him specifically. In practice, the rules outlined in *Boness* by the Court of Appeal clearly called for the issuance of specific terms which fulfilled those requirements.<sup>120</sup> Practically, this means that the terms of an ASBO must be set out as clearly as possible, for example with the use of maps to illustrate exclusion zones, and the inclusion of a list of nicknames or 'street names' when imposing an order prohibiting association with others. Those terms are meant to provide an easily understandable guide about how not to behave in a particular social context, in terms which can be followed and applied in practice by the responsible individual.

These rules of behaviour are meant to guide the individual in his relationship with those affected by his anti-social behaviour, and are not necessarily applicable to all social interactions. For example, if an individual is given an ASBO for behaving in a threatening manner with his friends in a particular neighbourhood, the terms of the order are likely to include a prohibition against associating with others in public, whether by name or in general. The purpose of this particular prohibition will be to

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<sup>120</sup> *Boness* (n 12), the requirements are listed at n 108.



illustrate what behaviour can adversely affect the individual's relationship with a given community: congregating in large numbers in a particular area, for example in the staircase or public area of an apartment block, can be conceived as threatening and have a negative impact on others. However, congregating with others in other situations will not always have a negative impact, for example if the individual is taking part in a sporting or community event.<sup>121</sup> In this case, the terms of an ASBO can be drafted to reflect the distinction, communicating clearly that congregating with others is not necessarily bad in and of itself but will be so in a certain context.

### ***b) Communicating with the community***

The dual nature of ASBOs also shapes the information sent out to the community affected by the behaviour, showing that action is being taken and detailing the measures involved. The courts' interpretation of the provisions relating to the publicity of ASBOs emphasises the role this type of communication could play in informing and reassuring the community.<sup>122</sup> The communicative exercise involved by the imposition and publication of an ASBO has been explicitly framed in relation to the relevant community, to ensure the protection of those affected by the behaviour and allow their participation in the enforcement of the order.

The communication in this context therefore went beyond the direct question addressed by the case, which involved the protection of underage defendants,<sup>123</sup> and rested on a right for the affected community to be informed, reassured and assisted in enforcing the existing orders.<sup>124</sup> This aspect of the communicative function of ASBOs therefore focused on the specific protected interests of the relevant community. In

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<sup>121</sup> The example is loosely drawn from a similar case heard by the High Court and mentioned in chapter 3, (n 81) *N v DPP* [2007] EWHC 883 (Admin).

<sup>122</sup> *R (T) v St Albans City Council* [2002] EWHC 1129 (Admin) and *R (Stanley, Marshall and Kelly) v Metropolitan Police Commissioner* [2004] EWHC 229 (Admin). The first case concerned an 11 year old boy who was given an ASBO for "harassing" his community, and causing worrying incidents of violence against a baby, while the second case dealt with 17 year old twins who were each subjected to an order for 'terrorising' their neighbours over two years; the facts and the decision are discussed more fully in chapter 3, text to n 96.

<sup>123</sup> In *St Albans CC*, the decision to restrict publicity was eventually upheld, whereas in *Stanley* the right to publicise the orders prevailed, provided was not actually used for 'naming and shaming' the recipients of the orders.

<sup>124</sup> *Stanley* (n 122), [40]; Elias J. Also invoked the fact that the 'local community has a proper interest in knowing who has been seriously and persistently damaging its fabric,' *ibid*, [22].

these cases, they were essentially defined by their local character, and their interest in enjoying their neighbourhood. As a result, the communication of the orders would be focused on publicising them within a particular area, and reaching those affected most efficiently. In one case where a specific block of residents had suffered the most from the anti-social behaviour, this involved a range of different mediums, from the publication of the order on the authority's website and in the local borough newsletter, to the production of leaflets distributed within the exclusion zone.<sup>125</sup> The courts' insistence that publicity should not be used solely to name and shame recipients of an ASBO emphasises the orders' purpose in regulating the recipients' relationship with the community in question. Publicity in this context is encouraged, at least in principle, only if it involves a communication which showcases and potentially reinforces the relationship which forms the basis of the orders' liability. This purpose is a reflection of communitarian principles and highlights an important change in the communicative function of liability.

## **2. ASBOs and community-based liability: changing the communicative function of liability**

In the traditional liberal vision of criminal liability, the communication is essentially vertical, and relies on the laying down of general rules of behaviour to regulate individual behaviour. Legal provisions generally take the form of prohibitions which command individuals not to do a particular action because it would hurt or threaten to hurt others' predetermined protected interests.<sup>126</sup> According to Duff's liberal-communitarian account of punishment, the communicative function of the law of a community composed of individuals defined by their social relations differs from that of traditional criminal liability. Rather than representing a prohibition imposed by the sovereign state, the law would then become a declaration regarding the wrongfulness of a particular action, which wrongfulness 'properly concerns the whole community and ... must be recognised and condemned as such by the community.'<sup>127</sup>

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<sup>125</sup> Stanley (n 122), [36].

<sup>126</sup> This is expressed specifically in the harm principle, see chapter 4, n 21-22.

<sup>127</sup> R A Duff, *Punishment, Communication and Community* (OUP 2001), 158.

The focus of this theory is firmly on the nature of the communication expressed by the law, and Duff makes the distinction between prohibitions which prevent individuals from behaving in a certain way, and declarations which remind individuals that they should not behave in a certain way.<sup>128</sup> The aim of penal law and of the criminal trial, conviction and punishment, is to 'persuade [individuals] to refrain from criminal wrongdoing because they realise that it is wrong.'<sup>129</sup> The role of the state, as legislator, is not solely to prohibit and impose, but also to inform and convince.

This account of the communicative nature of liability applies to criminal liability specifically,<sup>130</sup> and as such, Duff's invocation of the notion of community represents society in general, rather than a specific community.<sup>131</sup> Nevertheless, it provides a striking account of how the communicative function of the orders' dual nature can be seen as a way to regulate the relationship and potentially enhance it. According to this theory, the communicative nature of punishment can be a function of the relationship that is being regulated by the imposition of liability. Punishment seen from this communitarian perspective pays great attention to the individual's relationship with society, and is seen as benefiting both 'the criminal [himself], as well as others: it aims to repair relationships whose damage or destruction is injurious to [him] as well as to others.'<sup>132</sup> In fact, Duff sees the purpose of punishment, to be achieved through censure and education, as the reparation of the harm caused to the criminal's relationships as well as any material harm caused by that crime.<sup>133</sup> In doing so, the punishment would therefore restore the individual to his 'full membership' of the community. Rather than being uttered by the all-powerful state legislator as the sole agent interacting with specific individuals, albeit in the name of other specific

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<sup>128</sup> Duff, *Punishment, Communication and Community* (n 127), chapter 2, section 4.1 and chapter 3, section 2.2; as well as R A Duff, 'Law, Language and Community', (1998) 18(2) OJLS, 189.

<sup>129</sup> Ibid, 81.

<sup>130</sup> Duff acknowledges that his vision of criminal liability is only applicable to certain types of rehabilitative punishment, and that it 'does not purport to be true of or to justify our existing penal practices,' R A Duff, 'Penal Communications' in Michael Tonry (ed), *Crime and Justice*, Vol. 20 (Univ. of Chicago Press 1995), 50.

<sup>131</sup> Duff adopts a concept of community which is wider than the concept of 'web of understanding', and which relies on a certain degree of moral attachment; Duff's 'academic' community example is presented more extensively in ch 4 (n 149).

<sup>132</sup> Duff 'Penal Communications' (n 130), 49.

<sup>133</sup> Ibid, 48.

individuals, the 'voice' of the law can become a 'first person plural voice ... addressing itself, the voice of all the citizens addressing one another and themselves.'<sup>134</sup>

By focusing on an individual's relationship with a particular community, a model of community-based liability also alters the communicative function of the law, albeit on a different scale.<sup>135</sup> The identity of that 'first person plural voice' would be the community affected by the behaviour in question, in the context of its relationship with the responsible individual. The communication involved in this type of liability would therefore rely on the constitutive nature of social interactions and the reflective link it draws between the responsible individual and the community affected by the behaviour.

Similarly, ASBOs' dual nature creates a particular type of communication which is shaped by the relationship it seeks to regulate. From the perspective of the recipient of an ASBO, the initial injunction and its specific terms provide a guide on how to behave in the context of the recipient's relationship with a particular community. The specificity of the terms also speaks to the impact his behaviour has had on the community, by highlighting which actions caused harm to the community's interests. Finally, the criminal offence upon breach and its relatively serious sentence indicate the scope of that impact on the community, and the severity with which it is considered by the law. From the perspective of the community affected by the behaviour, the initial injunction aims to provide an expression of the harm caused to it, and a reassurance that it is being addressed by the law, while the criminal offence emphasises the seriousness of the liability imposed.

Perhaps more importantly, the reliance on a two-step process also indicates one key aspect of the communicative function of the orders' dual nature: that despite the responsible individual's interference with a community's interests, the relationship between them can be salvaged. This redemptive message is perhaps not always explicitly articulated in a positive manner in the application of the orders, but it stems

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<sup>134</sup> Duff, *Punishment, Communication and Community* (n 127), 59.

<sup>135</sup> A similar interpretation of Duff's theory has also been put forward in relation to the use of preventive measures against individuals who have committed acts preparatory to the commission of a crime, which 'need not necessarily be viewed as inconsistent with Duff's conception of autonomy, particularly in light of the communitarian underpinnings of his communicative theory of crime and punishment,' Daniel Ohana, 'Responding to Act Preparatory to the Commission of a Crime: Criminalisation or Prevention?' (2006) 25(2) *Criminal Justice Ethics* 23, 32.

from the very existence of an initial civil injunction prefacing the use of criminal liability. The requirement of wilful engagement reinforces the possibility of rehabilitation: it is precisely because the socially constituted individual can and has wilfully engaged with the community affected by his behaviour that he is deemed capable of changing the way he engages with it. The initial injunction will provide guidance on how to do it, and the threat of criminal enforcement will provide a motivation for it.

## **CONCLUSION**

With hindsight, the study of ASBOs reveals a more nuanced take on individual responsibility than was originally envisaged when they came into force. A commentator predicted at the time that the CDA was open to interpretation and that 'its historical legacy may be determined as much by the winds of change as by its own contents.'<sup>1</sup> Indeed, the policy documents and political discussions regarding the introduction of ASBOs outlined a broad vision to protect communities, although the application of that vision was principally left to local authorities' decisions and judicial discretion.

The framework of community-based liability developed in this thesis provides a lens through which to see the legacy of ASBOs more clearly. The normative value of ASBOs lies in their representation of a different type of liability, based on an individual's relationship with a particular community. From this perspective, one can move beyond the political rhetoric which surrounded their introduction and the criticism accusing them of corrupting legal principles of liability. Their combination of civil and criminal elements reveals a different approach to individual responsibility, at the heart of which lies the recognition of communities as legal entities, and their protection from harm caused by individual behaviour.

These principles are the foundations of an alternative model of community-based liability, in which an individual can be held liable for behaviour that harms the protected interests of a particular community, provided he was wilfully engaging with that community. The legal definition of the orders, and their application and interpretation by the courts, all suggest that this model provides a normative framework through which to better understand ASBOs' nature and purpose. And although there have been some misapplications of the principles underlying this model of liability,<sup>2</sup> these do not in themselves justify the accusations that ASBOs are an

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<sup>1</sup> Julia Fionda, 'Crime and Disorder Act 1998: New Labour, Old Hat' [1999] CrimLR 36, 47.

<sup>2</sup> For instance, the high rate of breach of the orders suggests a failure to reform individual behaviour effectively, and accusations of a disproportionate use of ASBOs against young people raised the prospect of a particular class being excluded.

unprincipled imposition of liability.<sup>3</sup> The practical application of ASBOs may have created missed opportunities, yet ASBOs represent an innovative legal mechanism with the potential to regulate an individual's behaviour in the context of his relationship with a particular community.

However, now that ASBOs have been abolished by the Anti-Social Behaviour Crime and Policing Act 2014 (ASBCPA 2014), the lack of guidance and clarity of purpose which caused these misapplications is unlikely to be remedied.<sup>4</sup> Moreover, the measures introduced to replace ASBOs appear to abandon most of their innovative features and move further away from the principles underlying a model of community-based liability.

## **I. The Anti-Social Behaviour Crime and Policing Act 2014: overhauling anti-social legislation.**

The ASBCPA 2014 arose out of an earlier electoral promise made by the coalition to 'introduce effective measures to tackle anti-social behaviour and low-level crime.'<sup>5</sup> A consultation followed in May 2012, resulting in a White Paper entitled 'Putting Victims First: More Effective Responses to Anti-Social Behaviour.'<sup>6</sup> The paper outlined a broad range of measures following four main objectives: focusing on the need of victims, empowering communities to get involved, ensuring professionals are able to protect the public and focusing on long-term solutions.<sup>7</sup>

In terms of anti-social behaviour,<sup>8</sup> ASBCPA 2014 introduces six new measures to replace nineteen existing ones. Two are deemed to be 'dealing with anti-social

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<sup>3</sup> This does not deny that individual cases can be problematic and potentially unfair where the principles of community-based liability are misapplied.

<sup>4</sup> As of May 2014, some provisions of the ASBCPA 2014 have come into force, but no date has been set for the introduction of particular measures discussed here.

<sup>5</sup> *The Coalition: our programme for government* (London Cabinet Office, May 2010), p.24.

<sup>6</sup> Home Office, *Putting Victims First – More Effective Responses To Anti-Social Behaviour* (Cm 8367, 2012)

<sup>7</sup> *ibid*, 7.

<sup>8</sup> The ASBCPA 2014 also deals with a range of other issues, including dangerous dogs (part 7), firearms (part 8), extradition (part 12) and criminal justice and legal fees (part 13).

individuals<sup>9</sup>—specifically the Criminal Behaviour Order (CBO) and the Crime Prevention Injunction (CPI)—whilst the other four deal ‘with anti-social behaviour in the community.’<sup>10</sup> The Community Protection Notice<sup>11</sup> addresses a local community’s quality of life and the Community Protection Order<sup>12</sup> deals with anti-social behaviour in public spaces, while the Directions Power<sup>13</sup> and Community Protection Order<sup>14</sup> introduce dispersal and closure powers.

The first two measures are specifically meant to replace ASBOs: a civil injunction available on application and an order available on conviction. The CPI is defined in sections 1 to 22 of ASBCPA 2014.<sup>15</sup> Section 1 stipulates two conditions for its application: first, that the court be satisfied that the respondent has engaged or threatens to engage in anti-social behaviour and, second, that it considers it ‘just and convenient’ to grant an order to prevent such behaviour.<sup>16</sup>

The civil nature and procedure of the CPI makes it superficially similar to ASBOs on application, but there are important differences. The decision to grant an order will be made if the court considers it ‘just and convenient’ – as opposed to ‘necessary’<sup>17</sup> – and the existence of anti-social behaviour is to be proved to the civil standard, rather than criminal as is the case with ASBOs.<sup>18</sup> This emphasis on the civil nature of proceedings is reinforced by the fact that breach of the injunction does not represent a specific offence, but is treated as a breach of a regular injunction, and constitutes civil contempt.<sup>19</sup>

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<sup>9</sup> *Putting Victims First* (n 6), Annex B, p. 46.

<sup>10</sup> *Putting Victims First* (n 6), 47.

<sup>11</sup> ASBCPA 2014, pt 4, ch 1, ss 43-53.

<sup>12</sup> ASBCPA 2014, pt 4, ch 2, ss 59-68.

<sup>13</sup> ASBCPA 2014, pt 3, ss 34-42.

<sup>14</sup> ASBCPA 2014, pt 4, ch 3, ss 76-83.

<sup>15</sup> ASBCPA 2014, pt 1.

<sup>16</sup> ASBCPA 2014, ss 1(1) and 1(2); ss 1(1) specifies that the finding of anti-social behaviour is to be proved ‘on the balance of probabilities.’

<sup>17</sup> The test for ASBOs, CDA 1998, s 1(1)(a).

<sup>18</sup> This precision appears to be a direct reaction to the *McCann* decision, which introduced a criminal standard of proof to the initial finding of anti-social behaviour in ASBOs, as discussed in ch 1 (n 16).

<sup>19</sup> The distinction between ASBOs and civil contempt and its relevance to the nature of responsibility is discussed in chapter 1, ss IIB1a and IIB2a; one key practical difference is that the penalty for contempt of court is 2 years imprisonment, as opposed to 5 years for breach of an ASBO.



The CBO is defined separately in part 2 of ASBCPA 2014.<sup>20</sup> It is only available against someone on conviction for a criminal offence,<sup>21</sup> and section 22 sets out conditions which differ from those defining CPIs:

(3) The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person.

(4) The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour.

These orders are more directly similar to ASBOs on conviction.<sup>22</sup> Here, the applicable burden of proof to prove anti-social behaviour is criminal,<sup>23</sup> and section 30 creates a specific criminal offence for breach of the order, in keeping with ASBOs' dual nature.<sup>24</sup> One key difference is that rather than being premised on its necessity, the decision to grant an order will be made by the judge if he considers that it 'will help in preventing' further anti-social behaviour.<sup>25</sup>

One common characteristic distinguishes both the CPI and the CBO from ASBOs: if the court decides to grant an order or an injunction, it may 'prohibit the respondent from doing anything described in the injunction,'<sup>26</sup> as with existing orders, but it can also 'require the respondent to do anything described in the injunction.'<sup>27</sup> This addition sets the new measures more clearly apart from ASBOs, which were strictly prohibitive in their terms. Still, both adopt a clear requirement of specificity and clarity<sup>28</sup> in the drafting of those terms, similar to that developed by judicial interpretation of ASBO legislation.<sup>29</sup>

CPIs and CBOs both have a highly qualified relationship with ASBOs. Whilst they clearly reflect the overall structure of their predecessors, key substantive characteristics explicitly reject the legacy of ASBOs. By doing away with some of the

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<sup>20</sup> ASBCPA 2014, ss 22-30.

<sup>21</sup> 'This section applies where a person ("the offender") is convicted of an offence,' ASBCPA 2014, s 22(1).

<sup>22</sup> CDA 1998, s 1C.

<sup>23</sup> As is the case for ASBOs, see above, n 18.

<sup>24</sup> CDA 1998, s1(10) creates a similar distinct offence for the ASBOs.

<sup>25</sup> ASBCPA 2014, 22(3).

<sup>26</sup> ASBCPA 2014, s 1(4)(a).

<sup>27</sup> ASBCPA 2014, s 1(4)(b).

<sup>28</sup> ASBCPA 2014, ss 3 and 24 both specify that the court must consider a term's 'suitability and enforceability,' as well as its compatibility with other terms.

<sup>29</sup> See ch 3, text to n 84 and in particular the case of *Boness v R* [2005] EWCA Crim 2395 .

more innovative features of the ASBO, and in particular its dual civil and criminal nature, these two measures move also further away from representing a model of community-based liability, as developed in this thesis.

## **II. CPIs and CBOs: Moving Away from Community-Based Liability.**

The use of a straightforward injunction as a replacement ASBO on application indicates a clear change of perspective with regards to individual responsibility. By reverting to the use of civil contempt, ASBCPA 2014 effectively shifts the relational nature of the individual's responsibility to focus on his violation of the court's authority, rather than his responsibility towards a particular community. This reversal abandons the conceptual significance of having a distinct criminal offence attached to the initial injunction: the CPI will sanction the individual's lack of respect for the court's authority instead of regulating his relationship with the affected community.

CBOs, on the other hand, appear to preserve ASBOs' construction of liability, via the creation of a distinct criminal offence to sanction breaches of the initial civil order. Nevertheless, the distinction drawn between CBOs and CPIs in ASBCPA 2014 muddies the waters in terms of individual responsibility, creating two distinct processes to tackle similar types of behaviour in different situations. This confusion was originally more flagrant at the drafting stage, as the wording of the injunction was intended to target behaviour which caused 'nuisance and annoyance' rather than 'harassment, alarm or distress',<sup>30</sup> introducing a lower threshold for the CPI. Although the latter term is now used for both measures after an amendment in the House of Lords, this initial

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<sup>30</sup> The term 'nuisance and annoyance' was preserved in the context of behaviour which takes place 'in residential premises,' ASBCPA 2014, s 3; see Andrew Arden and Robert Brown, 'A brief history of crime: ASB and housing' (2014) 17(3) *Journal of Housing Law*, 43, for a discussion of the CPI in the specific context of housing.

distinction appears to confirm that each measure took a different approach to liability.<sup>31</sup>

This further reinforces the civil nature of the initial injunction in contrast with the criminal nature of the post-conviction order, and implies a rigid dichotomy between civil and criminal liability. In practice, this means that if this separation is entrenched, the nuances inherent to ASBOs' dual nature and its consideration of the impact of anti-social behaviour will likely be lost. In the case of *Barclay*, for instance, the distinction that the court drew between the criminal harm of drug-dealing and its anti-social nature relied on ASBOs being clearly distinct from both civil and criminal liability.<sup>32</sup> By embracing a more traditional distinction between CPIs and CBOs, ASBCPA 2014 risks surrendering that nuance entirely. Liability for the civil injunction would remain clearly civil, and the order on conviction would likely be restricted to behaviour considered criminal or 'pre-criminal', rather than distinctly harmful to a particular community.

Even more significantly, the policy documents and political discussions surrounding ASBCPA 2014 also suggest a different approach to the concept of community. Although ASBCPA 2014 does claim to place the community at the heart of its efforts to 'put victims first' when dealing with anti-social behaviour, it appears to take a restrictive view of community relationships, focusing specifically on their local nature. In the White Paper that preceded the reform, the government clearly stated that 'anti-social behaviour is a fundamentally local issue, one that looks and feels different in every area, in every neighbourhood and to every victim.'<sup>33</sup> This local focus informs the delegation of powers to local authorities, and is also reflected in the other four measures introduced by ASBCPA 2014, which all operate specifically in a local community context.<sup>34</sup>

The concept of community adopted in these measures appears therefore more restrictive than the flexible notion developed in ASBOs and underlying the model of community-based liability. The recognition of the shifting localised character of anti-

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<sup>31</sup> The amendment was proposed by Lord Dear in the House of Lords during the 3<sup>rd</sup> reading on the 27<sup>th</sup> January 2014, and was agreed to by the government in the House of Commons on the 4<sup>th</sup> February 2014.

<sup>32</sup> *Barclay* [2011] EWCA Crim 32, where three defendants were convicted of drug-dealing and granted an ASBO for their behaviour, as discussed in ch 3 (n 60) and ch 5 (n 14).

<sup>33</sup> *Putting Victims First* (n 6), 3.

<sup>34</sup> See above, n 11-14.

social behaviour does little to widen the concept of community beyond its local incarnation. This focus on local interests indicates a restrictive approach to a community's protection, embracing more traditional conceptions of community, rather than identifying specific protected interests to define communities and establish the existence of anti-social behaviour, as is the case in a community-based model of liability.<sup>35</sup> This shift could lead to a situation where the harm caused to a community is considered from a more subjective perspective, based on the perceptions of members of that community rather than objectively identified protected interests. The creation of a lower standard of behaviour where it takes place in residential premises further aggravates this risk,<sup>36</sup> as does the creation of a broader discretion for judges when deciding whether to grant an injunction or an order.<sup>37</sup> As a result, this could move the focus of individual responsibility for anti-social behaviour further away from considerations of the individual's relationship and wilful engagement with the community in question and towards a more exclusionary approach.<sup>38</sup>

Taken together, the new measures replacing ASBOs do not appear to have drawn much from the orders' approach to individual responsibility. It is possible that the combined efforts of subsequent governments, local authorities and judicial pragmatism may still shape these measures' take on individual responsibility, as was the case with ASBOs. But the strong, community-based model of liability that emerged from ASBOs' application and interpretation appears to have been compromised by the CPI and CBO.

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<sup>35</sup> See in particular ch 4, s IIIB for a discussion of how a behaviour's harm to a community can be identified by its interference with that community's specific protected interests.

<sup>36</sup> ASBCPA 2014, s 2(2).

<sup>37</sup> The test has shifted from 'necessary' (CDA 1998, s 1(1)(b)) to 'just and convenient' for CPIs (ASBCPA 2014, s 1(3)), and whether 'it will help in preventing' anti-social behaviour for CBOs (ASBCPA 2014, s 22(3)); the argument against such broad wording is also made in a commentary on the bill which preceded the ASBCPA 2014, in Kevin J Brown, 'Replacing the ASBO with the injunction to prevent nuisance and annoyance: a plea for legislative scrutiny and amendment', (2013) 8 Crim LR 623, 630.

<sup>38</sup> This is also anecdotally illustrated in the categorisation of the new measures as 'dealing with anti-social individual' or 'dealing with anti-social behaviour in the community' in the white paper *Putting Victims First* (n 6). The distinction suggests that the individual's relationship with the community affected by his behaviour is not a relevant consideration to his liability.

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